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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 595

BETHLEHEM STEEL COMPANY
(SHIPBUILDING DIVISION),
Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INDUSTRIAL UNION OF MARINE AND
SHIPBUILDING WORKERS OF AMERICA,
AFL-CIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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October 31, 1963.

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	10
CONCLUSION	26
APPENDIX A	
APPENDIX B	

TABLE OF AUTHORITIES CITED

Cases

Exposition Cotton Mills Co., 76 N.L.R.B. 1289 (1948) 24

Morand Brothers Beverage Co., 99 N.L.R.B. 1448 (1952) 24

NLRB v. American National Insurance Co., 343 U.S. 395 (1952) 13-14, 15

NLRB v. Bradley Washfountain Co., 192 F. 2d 144 (7th Cir. 1951) 20, 24

NLRB v. Crompton-Highland Mills, Inc., 337 U.S. 217 (1949) 17, 18-19, 20, 22-23

NLRB v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477 (1960) 17-18, 22-23

NLRB v. Katz, 369 U.S. 736 (1962) 17, 18-19, 20, 21, 23

PAGE

NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958) 11-16, 21

Quaker State Oil Refining Corp., 107 N.L.R.B. 34 (1953) 24

Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944) 13

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 21

W. W. Cross & Company, Inc., 77 N.L.R.B. 1162 (1948) 24

Statutes

28 U. S. C. § 1254(1) 2

29 U. S. C. § 158(a) (5) 2, 3, 4, 16

29 U. S. C. § 158(d) 3-4, 20-21

29 U. S. C. § 160(e) 2, 4

29 U. S. C. § 160(f) 4

Miscellaneous

Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057 (1958) 14-16

Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988 (1961) 15

Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 NYU CONF. LAB. 39 (1959) 15

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Petitioner Bethlehem Steel Company (the "Company") prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Third Circuit, entered in these actions on August 21, 1963.

Opinions Below

The Decision and Order of the National Labor Relations Board (together with the Trial Examiner's Intermediate Report), and the Supplemental Decision and Order of the Board are printed at pages 3a-87a and 87a-97a, respectively, of the accompanying Joint Appendix and are reported at 133 N.L.R.B. 1347 (1961)

and 136 N.L.R.B. 1500 (1962), respectively. The opinion of the court of appeals denying enforcement of the Board's order and remanding the case to the Board for further proceedings in accordance with the court's opinion is printed as Appendix A hereto*, and is reported at 320 F.2d 615 (1963).

Jurisdiction

The decree of the court of appeals was entered on August 21, 1963 (Appendix B). The jurisdiction of this Court is invoked under Section 10(e) of the National Labor Relations Act ("Act"), 29 U.S.C. 160(e) and 28 U.S.C. § 1254(1).

Questions Presented

1. Whether the Company's proposal that grievances to be handled (exclusively by Union representatives) in the grievance procedure be signed by the employees involved was a non-mandatory subject of bargaining under the Act; and, if so, whether the Company violated Section 8(a)(5) of the Act by failing to withdraw this proposal before the negotiations reached an impasse, although the Union did not then contest the Company's legal right to make the proposal and the Trial Examiner found that the proposal "was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it." (75a).

2. After the prior labor agreement expired and the Company lost the benefit of the Union's no-strike commitment, whether the Company was required to bargain

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*Page references to Joint Appendix are indicated by "a"; page references to accompanying Appendix A are indicated by "App."

with the Union before temporarily suspending superseniority for Union officials and certain grievance handling privileges solely for the purpose of putting economic pressure on the Union; and, if so, whether the Company satisfied that obligation by giving the Union prior notice of those changes and affording it opportunity to discuss the matter.

3. Whether the Company committed a *per se* violation of Section 8(a)(5) of the Act by putting into effect its proposals to the Union, after giving the Union notice of its intended action and after an impasse had been reached in the bargaining in which, the Board found, the Company had not failed to bargain in good faith.

Statutes Involved

National Labor Relations Act, Section 8(a)(5), 49 Stat. 453 (1935), as amended, 29 U.S.C. § 158(a)(5):

> "Section 8(a). It shall be an unfair labor practice for an employer—
>
> "(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

National Labor Relations Act, Section 8(d), 61 Stat. 142 (1947), 29 U.S.C. § 158(d):

> "(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to

agree to a proposal or require the making of a concession: . . ."

Statement

This case arose out of negotiations in 1959 between the Company and the Union for new collective bargaining agreements covering units of hourly-paid and salaried employees at the Company's eight East Coast shipyards (three of which have since been closed), to replace 3-year agreements which were entered into in 1956 and which expired on July 31, 1959.*

The Board found that the Company was not guilty of bad faith bargaining and that it did not violate the Act by putting its contract proposals into effect after the bargaining had reached an impasse and the previous contracts had expired (88a-89a). The Board concluded, however, that during the course of those negotiations the Company committed *per se* violations of Section 8(a)(5) of the Act by insisting on a proposal that grievances be signed by individual employees (88a) and by temporarily suspending, after expiration of the prior agreements, certain Union benefits consisting of superseniority for Union officials and grievance handling privileges (91a-92a).

The jurisdiction of the court of appeals was invoked to enforce and review the decision of the Board under Sections 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

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*Two agreements were involved: one covering hourly-paid employees and the other covering salaried employees, the terms of the former forming the basis for negotiations with respect to the latter (31a). Inasmuch as the issues are virtually the same as to both units, except that the Company did not put into effect its proposals for the salaried employees, for purposes of simplicity the statements in this petition refer to the bargaining for hourly-paid employees unless otherwise specifically stated.

This petition seeks review of the decree of the court of appeals denying enforcement of the Board's order and remanding the case to the Board for further proceedings in accordance with that court's opinion. In its opinion, the court of appeals (i) concurred with the Board's findings of violations by the Company and (ii) further held in effect that, because of those violations, it was not legally permissible for the Company to put its contract proposals into effect after an impasse in bargaining had been reached.

Economics Underlying the 1959 Bargaining

The bargaining in 1959, which was preceded by a long history of bargaining and contractual relations between the parties (534a-535a), took place under extremely adverse economic conditions. Foreign competition, aided by lower overhead and labor costs in foreign shipyards, had drastically reduced the amount of business available to American shipyards (396a-398a; 409a; 411-412a; 422a-424a; 919a-926a). In addition, the Company was suffering from competitive disadvantages in relation to other American shipyards (419a-420a; 657a-686a), because the other yards had more favorable terms of employment under their collective bargaining agreements (205a; 226a-227a; 238a-239a; 676a-683a; 694a-698a; 726a-727a; 739a).

Presentation of Company and Union Proposals

The Union outlined its proposals to the Company on July 7, 1959 (106a-107a). The next day the Company presented to the Union its contract proposals, supported by a carefully prepared economic statement and accompanying charts (657a-743a).

The Company's proposals embodied extensive contract reforms designed to improve the Company's competitive position (686a-743a). The Trial Examiner found as to the Company's proposals that "there was plausible and reasonable basis for virtually each of them, and the economic aspects were more a matter of preventing future increases in costs than reductions of existing wage rates. Indeed, there was no proposal to reduce anyone's wages" (69a).*

The Company's proposals provided for continuation of the extensive program of Union privileges and benefits which had been provided for under the prior agreements, such as compulsory maintenance of union membership (768a-769a), checkoff of Union dues (769a-771a), superseniority for Union representatives (800a-802a), leaves of absence for Union officers (800a) and a complete grievance procedure, including arbitration (810-823a).

The Company emphasized that it was not demanding particular contract language and urged the Union to address itself to the substantive difficulties to which the proposals were directed (458a-459a; 742a).

The Union's Response

Without even waiting to discuss the Company's proposals in the bargaining sessions, the Union immediately called local union meetings at which the Union's

*Contrary to the statement of the court below (App. 3), the Company's proposal did not propose to eliminate the cost-of-living adjustment which had accrued to that date, but to prevent it from increasing in the future; nor did it propose any material reduction in premium pay rates or place material limitations on the scope of the arbitration clause or the grievance procedure. Most of the changes in the grievance procedure were designed to expedite the procedures and to increase, rather than reduce, their effectiveness.

officers and members of the negotiating committee attacked the Company's proposals and demanded their rejection by the membership (338a-340a; 344a; 884a; 885a-903a; 913a). At the next bargaining session, held on July 15, the Union rejected all the Company's proposals (108a), stating that, if the Company persisted in its proposals, "it was headed for one hell of a fight and a hideous one" (202a).

On that same day, July 15, the Union presented detailed written contract proposals which it had summarized orally to the Company on July 7 (541a-542a). Despite the depressed condition of the shipbuilding and ship repair industries and the Company's poor competitive position, the Union demanded substantially increased benefits in no less than twelve basic areas (744a-748a; 750a-752a; 757a). These the Company rejected on the ground that they would either (1) increase the cost of the Company's operations, (2) give rise to additional grievances or (3) intrude on management authority necessary for efficient operation (449a-450a).

The Subsequent Negotiations

After the meeting on July 15, the parties proceeded to a re-discussion, Article by Article, of the detailed contract changes proposed by each (450a). These discussions took place on July 17, 20, 21, 22, 23, 24, 27, 28, 29, 30 and 31, August 1, 2 and 6 (166a-167a; 539a-540a). By August 6, they had come to a halt, the Union spokesmen having characterized them as "fruitless" (269a-270a).

During the meetings in July and August the Union failed to concede the justice of any of the Company's claims or to retract any of its own proposals for increases in costs and added interference with operational efficiency (194a; 346a-347a; 450a-451a).

Notification to the Union of the Suspension of Certain Union Privileges at the Expiration of the Prior Agreements

At a meeting on July 28, 1959, the Company notified the Union that on August 1, 1959, after expiration of the 1956 agreements, certain privileges which had been accorded to the Union under those agreements would be suspended. Those privileges, *all of which were provided for in the new agreements proposed by the Company* (see p. 6, *supra*), dealt with the relationship between the Company and the Union: compulsory Union membership, checkoff of Union dues and initiation fees, top seniority for Union officials, and formal grievance procedures and arbitration (542a-543a). The Company made clear, however, that it would continue to discuss grievances with Union representatives outside working hours (178a-179a; 277a-278a).

Subsequent Institution of Company Proposals

At a meeting on August 6, 1959, the Union stated that the negotiating procedures being followed were "fruitless" (269a-270a) and that it was "stupid" to continue to go over the proposals (156a). Despite the Company's urgent request for continuous sessions (848a-849a), the Union refused to meet between August 7 and 11 (159a-160a).

When the negotiations resumed on August 11, the Company stated its belief that the parties were at an impasse and that further delay in effectuation of the changes in terms and conditions of employment proposed by the Company could not be tolerated. Accordingly, the Union was notified that, effective August 13, the Company's proposals would, with certain stated exceptions, be put into effect (843a-847a). The em-

ployees continued to work under those terms and conditions of employment until the beginning of a strike in the latter part of January, 1960.

The parties met again on August 19 and several times during the months of September, October, November and January (272a-274a; 277a; 540a).

The Company's Grievance-Signing Proposal

The Company's contract proposals included a considerable number of revisions and refinements in the grievance procedure, in order to eliminate abuses and to make it more effective (including exclusive handling of grievances by Union representatives, shortening time limits for answering or appealing grievances, making grievance statements more explicit, filing of prehearing briefs with arbitrators, etc.) (810a-823a).

One proposal would have required that all grievances to be handled in the grievance procedure be signed by the employees involved (810a). Company representatives explained that this provision was needed in order to identify claimants (312a) and to prevent the grievance procedure from being misused as an instrument to harass the management.* In its explanation to the Union for the proposed changes in the grievance provisions, the Company stated (727a-729a):

> "We have changed the language of this Article substantially. Under our current agreement we have been flooded with grievances. The Union has openly stated that the grievance machinery would be and, in fact, has been used to harass the Management. The Union's Executive Secretary at Quincy has boasted that his Local has filed more

*Indicative of the harassment is the fact, as found by the Trial Examiner, that "there were about 800 grievances pending in the arbitration stage at the start of the bargaining period" (69a).

grievances than any other union in Massachusetts. This we can easily believe!

"The sheer volume of grievances places an almost prohibitively high cost for investigation on Management and upon investigation most of the grievances have been found to be without merit.

"...

"Obviously, a procedure that is subject to such wide abuse must be changed. When there are individuals who are not only willing to take advantage of such a procedure, but deliberately go out of their way to do so for the sole purpose of harassing Management, such a procedure becomes intolerable.

"...

"No grievance will be accepted in Step No. 1 unless it sets forth the facts upon which it is based and is signed by the aggrieved employee or employees. General statements covering any and every employee are out...."

The Union did not, before the negotiations reached an impasse, make any claim that the grievance-signing proposal was not a mandatory subject of bargaining or request that it be withdrawn on that ground.

Furthermore, that proposal was not the cause of, or a material contributing factor to, the impasse in bargaining. To the contrary, there is ample evidence to support the finding of the Trial Examiner that: "The question of employee signatures to grievances was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it" (75a).

Reasons For Granting The Writ

The decision below involves important questions of Federal law applicable to collective bargaining. It would result in unwarranted intrusion by the courts and the

Board into the parties' choice of contract proposals and bargaining tactics, matters which the Act leaves to the parties themselves. It would pervert the bargaining process into a game of legal chess, with emphasis on the avoidance of legal pitfalls rather than the resolution by agreement of the particular problems facing the employer and its employees. It would result in applying to employers different standards of conduct than this Court has applied to Unions. It involves serious misinterpretations of the Act and of decisions of this Court construing and applying the Act, and it is in conflict with decisions of this Court on related questions arising under the Act.

I.

THE HOLDING OF THE COURT BELOW THAT THE COMPANY COMMITTED AN UNFAIR LABOR PRACTICE BY ITS GRIEVANCE-SIGNING PROPOSAL IS CONTRARY TO THE ACT AND CONFLICTS WITH DECISIONS OF THIS COURT INTERPRETING AND APPLYING THE ACT.

In holding that the Company committed an unfair labor practice by its grievance-signing proposal, the court below relied on the decision of this Court in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958) (App. 7). In so doing, the court below misinterpreted and misapplied *Borg-Warner* with the result that serious questions are raised as to the scope of collective bargaining which warrant the attention of this Court.

Borg-Warner held that an unfair labor practice was committed by an employer in pressing a pre-strike bal-

lot proposal to impasse, because (1) the proposal was not a mandatory subject of bargaining—it did not deal with "wages, hours, and other terms and conditions of employment" but related "only to the procedure to be followed by the employees among themselves" and (2) the employer's refusal to sign any agreement without the proposed clause was such that it was tantamount to a refusal to enter into any agreement on mandatory subjects. Neither branch of that holding is applicable here.

1. The grievance-signing proposal was a mandatory subject of bargaining within the meaning of *Borg-Warner*, because it "regulates the relations between the employer and the employees." The employer is legitimately interested in the number and nature of grievances to be handled in the grievance procedure, and in protecting the process against abuse and making it available only in respect of matters of serious concern to employees. It is for this reason that employers and unions have traditionally negotiated and agreed on a wide variety of procedural details, including many that restrict a union's freedom of action, such as exclusion of some subjects entirely from the grievance procedure, placing stringent time limits on the filing and processing of grievances, limiting the number and location of union grievance representatives, prescribing who may attend grievance meetings and *requiring that employees sign grievances.*

The court below at one point agrees with the Board that "a grievance procedure" is within the statutory definition of bargaining and hence is a mandatory subject (App. 9). That finding is inconsistent with its conclusion that a grievance-signing requirement, which is a customary detail of such a procedure, is a non-manda-

tory subject. If collective bargaining is to have sufficient latitude and flexibility to permit the parties to accommodate the realities of industrial life in the agreement process, it is essential that the parties be free to bargain over details such as this.

Finally, there was no evidence in *Borg-Warner* that the pre-strike ballot clause was a normal and customary collective bargaining term, while here the evidence establishes that a requirement that employees sign grievances is a commonplace term in collective bargaining agreements throughout industry (926a-985a), including agreements between the Union and competitors of the Company (948a; 1017a-1018a). The weight to be accorded such evidence of common industrial practice was emphasized by this Court in *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952). In that case the Board held that the employer's insistence on a broad management rights clause was "in derogation of" the union's statutory bargaining rights. This Court, referring to evidence that management rights clauses are commonly included in collective bargaining agreements, reversed the Board, stating (p. 408):

> "... Bargaining for more flexible treatment of such matters would be denied employers even though the result may be contrary to common collective bargaining practice in the industry. The Board was not empowered so to disrupt collective bargaining practices. On the contrary, the term 'bargain collectively' as used in the Act has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States.' *Telegraphers v. Railway Express Agency*, 321 U.S. 342, 346 (1944)."

In concluding that the grievance-signing proposal was a non-mandatory subject of bargaining, therefore,

the court below misapplied, and the decision thereby conflicts with, *Borg-Warner* and *American National Insurance.*

2. But even if the Company's grievance-signing proposal was a non-mandatory subject, the Company's "insistence" on it was not tantamount to a refusal to enter into an agreement on mandatory subjects of bargaining. Although the Company did not withdraw this particular proposal before an impasse in the bargaining was reached, it is clear that the impasse was brought about by disagreement on many fundamental mandatory subjects of bargaining: "The question of employee signatures to grievances was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it" (75a); "A consistent refrain throughout the negotiations was the Union's unequivocal declaration that all the Company's demands were absolutely unacceptable" (61a). In the light of these findings, it is clear that the Company's grievance-signing proposal did not block agreement on mandatory subjects of bargaining and, therefore, the court below erred in applying *Borg-Warner.* In addition to that misapplication the decision below frustrates a basic philosophy of *Borg-Warner,* in that it deters the parties from bargaining about non-mandatory subjects which this Court expressly stated the parties are free to do, for bargaining without resolve is an empty gesture and under the lower court's decision bargaining with resolve would risk an 8(a)(5) violation.

3. Four Justices dissented in *Borg-Warner,* because of the "fear that the decision may open the door to an intrusion by the Board into the substantive aspects of the bargaining process" (*Borg-Warner,* at pp. 351-52). The then Professor Archibald Cox, in an analysis of this

Court's 1957-1958 labor decisions, expressed the same fear:

> "In my opinion it is both unsound and inconsistent with the basic philosophy of collective bargaining to license the NLRB and courts to determine the scope of effective contract negotiations."*

Professor Cox in his analysis observed that no longer would the interpretation of "wages, hours, and other terms and conditions of employment" only determine what subjects the parties must *discuss*, but, after *Borg-Warner*, will determine what subjects must be *excluded* from discussion. He further observed that the Board staff and judges did not possess the practical experience in industrial management and collective bargaining necessary to make such a determination. In addition, Professor Cox argued that by making that determination a matter of statutory interpretation a uniform rule would result, whereas the needs and practices of different industries required different rules. The dynamic nature of collective bargaining also requires more flexibility than could be achieved through the process of statutory interpretation.

Both the dissent and Professor Cox foresaw the potential for misapplication of *Borg-Warner*. Such misapplication, it was feared, would result in destruction of the philosophy of *American National Insurance, i.e.*, that practice in an industry should be respected by the Board and courts.

The misapplication of *Borg-Warner* here demonstrates that the fears of the dissenters and Professor

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*Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 VA. L. REV. 1057, 1083 (1958). *Accord*, Fleming, *The Obligation to Bargain in Good Faith*, 47 VA. L. REV. 988, 993-1006 (1961); Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 NYU CONF. LAB. 39, 49-50 (1959).

Cox were well founded. The effect of the decision below will be to eliminate grievance-signing provisions from collective bargaining agreements, even in industries where such provisions are commonplace and under circumstances where it is necessary to protect the grievance machinery from undue burden and abuse. Before such a mischievous result becomes imbedded from a misreading of *Borg-Warner*, it should be made plain that *Borg-Warner* neither commands nor sanctions any such rigid limitations on the scope and development of the constantly evolving collective bargaining process.

II.

THE HOLDING OF THE COURT BELOW THAT THE TEMPORARY SUSPENSION OF SUPERSENIORITY AND CERTAIN GRIEVANCE FORMALITIES, AT THE EXPIRATION OF THE PRIOR AGREEMENTS, CONSTITUTED A *PER SE* VIOLATION OF SECTION 8(a)(5), CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The court below found that the Company's temporary suspension on August 1, 1959, of superseniority for Union officials and certain grievance formalities, constituted a change in terms and conditions of employment which was governed by the rules concerning employer unilateral action. Without questioning the Board's finding that the Company acted in subjective good faith, the court purportedly applied the law of unilateral action and held the Company guilty of a *per se* violation of Section 8 (a) (5) (App. 9-10, 13). That hold-

ing misconstrues the nature of the Company's action and conflicts with this Court's decisions in *NLRB v. Insurance Agents' International Union, AFL-CIO*, 361 U.S. 477 (1960); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); and *NLRB v. Katz*, 369 U.S. 736 (1962).

1. In *Insurance Agents'* the union, in order to put pressure on the employer, caused its members unilaterally to make drastic changes in their customary employment practices.* The Board contended that those actions amounted to a "unilateral setting of the terms and conditions of employment" and hence were violative of the union's duty to bargain in good faith (*Insurance Agents'* at pp. 496-97 n. 28). This Court, however, ruled that those changes were merely a form of temporary economic pressure, immune from Board control.

The Company's suspension of Union privileges on August 1 must, similarly, be treated as temporary economic pressure rather than as a unilateral setting of conditions of employment. These were essentially Union privileges and not employee benefits (42a-44a). Continuation of these privileges was at all times provided for in the Company's proposals (800a-801a; 810a-823a); full ... ivileges would have been restored upon signing the new agreements. Accordingly, there was really nothing to bargain about when the Company suspended them, unless it be whether the Company should apply this kind of pressure to the Union. It makes no more sense to require bargaining about such a matter than it would to require bargaining by a union about whether

*Refused to solicit new business; refused to report new business obtained; refused to participate in company sales campaign; reported late; refused to perform customary office duties; refused to attend business conferences arranged by the company. *Insurance Agents'* at p. 480.

it should go on strike or apply other forms of pressure to an employer.

The decision below is in serious conflict with the holding in *Insurance Agents'* that: (1) economic pressure is "part and parcel of the system" of collective bargaining, its use being perfectly consistent with good faith bargaining; and (2) the Board should not apply *per se* rules in determining the issue of good faitn bargaining.

2. But even assuming that the Company's August 1 changes constituted unilateral action and not economic pressure, the lower court's decision is then in conflict with *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949); and *NLRB v. Katz*, 369 U.S. 736 (1962), for the reasons set forth under III below, and also for the reasons set forth hereunder.

The evidence is undisputed that at a bargaining session on July 28 the Company notified the Union that, after the expiration of the 1956 agreements, it would suspend the Union privileges on August 1, 1959 (542a-543a). That action was preceded by numerous bargaining sessions in which the Union had consistently refused to accede to any of the Company's proposals.* Negotiations continued over the next three days, July 29, 30 and 31 (539a-540a). The Union did not make any request that the Company bargain with it about the suspension of privileges and the Company did not refuse to discuss that subject with the Union.

The lower court, citing *Katz* and *Crompton-Highland Mills*, held that the Union was not given sufficient "bar-

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*As the Trial Examiner found, "A consistent refrain throughout the negotiations was the Union's unequivocal declaration that all the Company's demands were absolutely unacceptable." (61a).

gaining opportunity" to justify the Company's unilateral action. Those cases, however, do not support that holding.

In *Katz*, the employer took unilateral action "without first notifying or consulting the union" (*Katz*, 369 U.S. at p. 744). In holding that that action violated the employer's duty to bargain, the Court stated the rule as follows: "Unilateral action, by an employer *without prior discussion with the union* does amount to a refusal to negotiate about the affected conditions of employment under negotiations, and must of necessity obstruct bargaining, contrary to the congressional policy" [Emphasis added] (*Katz*, 369 U.S. at p. 747).

In *Crompton-Highland Mills*, where the issue was the desire of the employer to reach agreement with the union, the employer increased rates of pay "without prior consultation" with the bargaining representative, which this Court found justified an order of the Board requiring the employer "to cease and desist from refusing to bargain collectively by taking action, *without prior consultation with the authorized collective bargaining representative of the employees*, with respect to general rates of pay which are substantially different from, or greater than, any which the employer has proposed during its negotiations with such representative" [Emphasis added] (*Crompton*, 337 U.S. at p. 225).

Both *Katz* and *Crompton-Highland Mills* hinged on lack of notice to, or consultation with, the bargaining representative prior to the institution of the changes. In this case, there was prior notice to the Union and ample opportunity for it to bargain if it had so desired. The court below erred, therefore, in holding that the Company's action was violative of the rule enunciated by this Court in those decisions.

III.

THE HOLDING OF THE COURT BELOW THAT THE PUTTING INTO EFFECT OF THE COMPANY'S PROPOSALS ON AUGUST 13 CONSTITUTED A VIOLATION OF THE ACT, CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING EMPLOYER UNILATERAL ACTION AND INTRODUCES UNWORKABLE COMPLICATIONS INTO THE COLLECTIVE BARGAINING PROCESS.

The Company put its contract proposals into effect on August 13, (i) after giving the Union notice of its intended action (160a-161a; 843a-847a), (ii) after a lengthy period of bargaining (539a-540a), (iii) in which the Union had consistently refused to make any concessions (61a), (iv) after a complete impasse or deadlock in the negotiations had been reached (57a) and (v) after the prior agreements had expired (537a). The Board concluded that the Company's action did not violate the Act, because an impasse had been reached and the Company had bargained in good faith.* The contrary holding of the lower court is in basic conflict with the decisions of this Court in respect of bargaining and unilateral action.

Section 8(d) of the Act defines "bargain collectively" as "... the mutual obligation ... [1] to meet ... and confer [2] in good faith [3] with respect to wages, hours,

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*In fact, under the prevailing decisions an impasse is not necessary to justify unilateral action. Under *Katz* and *Crompton-Highland Mills*, all that is required is that the bargaining representative be given notice of and an opportunity to bargain about the proposed change, which requirement was fully satisfied in this case (see *NLRB v. Bradley Washfountain Co.*, 192 F. 2d 144 (7th Cir. 1951)).

and other terms and conditions of employment . . . ." In *Katz* this Court held that an employer is guilty of refusing to bargain collectively when, *without first notifying or consulting the union*, he unilaterally changes conditions of employment, regardless of his good faith, for if an employer refuses even [1] "to meet . . . and confer" the issue of [2] "good faith" is never reached.

Likewise, in *Borg-Warner*, this Court held that an employer could be found guilty of refusing to bargain, *regardless of his good faith*, where he in effect refused to bargain over the mandatory subjects, *i.e.*, [3] "with respect to wages, hours, and other terms and conditions of employment . . . ."

No contention is, or could be, made that the Union was not notified and given full opportunity to bargain over the changes proposed by the Company. Nor is the issue of mandatory bargaining subjects relevant to a determination of this aspect of the case. The issue, then, is the [2] "good faith" of the Company as evidenced by the totality of its conduct.

The Trial Examiner and the Board both found that the Company was not guilty of bad faith bargaining (75a, 88a-89a). The Board expressly took into account what it regarded to be the Company's violations in connection with its grievance-signing proposal and its suspension of Union privileges at the expiration of the prior contracts, but concluded that "considering the totality of Respondent's conduct we are unable to conclude from the present record that Respondent did not honestly endeavor to reach an agreement in its negotiations with the Union" (88a-89a). Under the rule applied by this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Board's finding on this issue is conclusive, because there is ample evidence

in the record to support it.

The court below, however, asserted that it was not necessary for it to consider whether the Board erred in finding that the Company did not bargain in bad faith, because it held *as a matter of law* that the Company was not legally justified in taking unilateral action on August 13, on account of the two preceding violations (App. 11). That, of course, was just a way of paying lip service to the Board's unassailable finding of good faith, while proceeding to ignore it and to substitute the court's view for the Board's conclusion. This holding thus calls for review by this Court, not only because it invades the province of the Board on matters of fact, but particularly because it conflicts with the policy of this Court against the application of *per se* rules in determining whether good faith bargaining has taken place.

In *Insurance Agents'* (361 U.S. 477), this Court reversed a Board finding that a union was guilty as a matter of law of violating Section 8(b)(3) because during negotiations it had caused its members to engage in harassing tactics* designed to put economic pressure on the employer, although the Board also found that the union "conferred in good faith for the purpose and with the desire of reaching an agreement with [the employer] on a contract" (*Insurance Agents'*, at p. 480). Justice Frankfurter, writing a separate opinion in which Justices Harlan and Whittaker concurred, made clear why it is improper for the Board to apply *per se* rules in determining good faith bargaining (*Insurance Agents'*, at pp. 508-10).

In *Crompton-Highland Mills* (337 U.S. 217), where the employer unilaterally put into effect an increase in wages substantially greater than any offered to the

*See note on p. 17, *supra*.

union during negotiations, this Court upheld the Board's factual inference that the employer did not bargain in good faith. But, as explained by Justice Frankfurter in *Insurance Agents'* (p. 509):

> "The *Crompton-Highland* decision rested not on approval of a *per se* rule that unilateral changes of the conditions of employment by an employer during bargaining constitute a refusal to bargain, but upon the inferences of a lack of good faith which arose from the facts, among others, that the employer instituted a greater increase than it had offered the union and that it did so without consulting the union. . . ." (See also *Katz* at pp. 743; n. 11, and 745.)

Thus, *Crompton-Highland Mills* and *Insurance Agents'* requires the Board, in approaching a case involving unilateral action, to determine whether such action, together with all the other facts in the case, compels the factual inference that the employer was not bargaining in good faith. Here the Board made its determination in favor of the Company, and the lower court erred in applying a *per se* rule of law to avoid the Board's finding of good faith bargaining.

Neither the Act, nor the decisions of this Court construing the Act, warrant (a) conditioning privilege of unilateral action upon lack of prior violations, or (b) imposing upon an employer an additional penalty for such violations in the form of disqualifying it from taking unilateral action. Under the decisions of this Court, unilateral action, without prior consultation with the union, is violative of the Act, because it frustrates the statutory objective of establishing working conditions through bargaining (*Katz*, at pp. 743, 747). Where, as here, the union has been given notice and opportunity for bargaining and agreement can not be reached due to

disagreement over bargainable subjects, unilateral action is permissible, because under those conditions it does not signify a lack of desire to reach agreement. See, *e.g.*, *NLRB v. Bradley Washfountain Co.*, 192 F.2d 144 (7th Cir. 1951); *Quaker State Oil Refining Corp.*, 107 N.L.R.B. 34 (1953); *Morand Brothers Beverage Co.*, 99 N.L.R.B. 1448, 1465 (1952); *W. W. Cross & Company, Inc.*, 77 N.L.R.B. 1162 (1948); *Exposition Cotton Mills Co.*, 76 N.L.R.B. 1289 (1948).

The lower court's decision, if upheld, would convert the bargaining process from an instrument of free and open discussion of the particular problems facing the parties, into a game of legal chess, with emphasis on legal technicalities rather than matters of substance. This case perfectly illustrates the point. Here an employer, with a long history of contractual relations with the Union and motivated by economic necessity, endeavored to obtain contract reforms as to which the Trial Examiner found that "there was plausible and reasonable basis for virtually each of them" (69a). It engaged in detailed explanation and discussion of the reasons for its proposals, and was met with "the Union's fixed and stony inflexibility" (75a). Failing agreement and after loss of the Union's no-strike commitment at the expiration of the prior agreements, its only recourse was, first, to put economic pressure on the Union by suspending certain Union privileges and, finally, to put its proposals into effect without the Union's agreement.

The Board, passing judgment on the Company's proposals, decreed that one (a very minor matter in the bargaining and which did not materially affect the impasse) was not a mandatory subject of bargaining, and also held that the Company was not privileged to suspend two union benefits at the expiration of the prior

agreements. It has been pointed out in I and II, above, that there are serious questions as to whether the Company violated the Act in either respect. At most, the violations found by the Board were not serious, as is implicit in the Board's finding that the Company did not bargain in bad faith. Nevertheless, the lower court embroidered on these asserted violations to hold that, as a matter of law, they tainted the Company's subsequent unilateral action in putting its proposals into effect.* This holding is not only based on a major distortion of the record, but, more importantly, it ignores the Board's finding of good faith and converts what in reality was a sincere and legitimate effort by the employer to solve pressing industrial problems by the voluntary agreement process, as envisioned in the Act, into a tangle of statutory violations. It is this serious and unwarranted interference with the collective bargaining process, as well as the failure to give proper regard to the Board's finding of good faith, which deserves the attention and action of this Court.

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*Not only did the court below mistakenly apply a *per se* rule of law to circumvent the Board's finding of good faith on the part of the Company, but in an apparent effort to buttress its conclusion that the Company was disqualified from putting its contract proposals into effect on August 13, because of the asserted two prior statutory violations, the court below sought to link the impasse with those violations, asserting that the Union's adament rejection of the Company's proposals was "completely justified" in view of "the company's unlawful insistence on its grievance-signatory plan and its unilateral alteration of the conditions of employment on August 1st" (App. 13). That assertion is wholly unsupported by the evidence. The record is indisputably clear that the Union took an irreconcilable position with respect to the Company's proposals from the very beginning of negotiations, long before any of the alleged violations occurred, and it maintained that position consistently throughout the negotiations (55a-57a; 74a-75a). There is not the slightest evidentiary support for the conclusion that the opposition of the Union was in any material respect caused or affected by the alleged violations. Instead, the record completely supports the Trial Examiner's finding that "this was fundamentally an economic disagreement" (74a).

Conclusion

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 1963.

APPENDIX A

Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,052

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Intervenor.

ON PETITION TO REVIEW AND MODIFY AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

No. 14,102

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Intervenor.

ON PETITION TO REVIEW AND MODIFY AND ON CROSS-PETITION TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Argued May 21, 1963
Before STALEY, HASTIE and SMITH, *Circuit Judges.*

OPINION OF THE COURT
(Filed July 30, 1963)

By STALEY, *Circuit Judge.*

The National Labor Relations Board has found that the Bethlehem Steel Company (Shipbuilding Division) violated §8(a)(5) and (1) of the National Labor Relations Act.[1] The case is here on petitions for review filed by both the company and the charging union, Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO, and on the cross-petition of the Board for enforcement of its order. The employer asserts that the Board's findings are unwarranted, while the union contends that the Board should have found additional violations.

The circumstances giving rise to this proceeding occurred during the summer of 1959 when Bethlehem and the union were negotiating a new collective bargaining agreement to cover hourly-paid employees at the company's east coast shipyards.[2] A prior agreement, executed in 1956, had an expiration date of July 31, 1959. The union made an oral presentation of its bargaining demands on July 7, 1959. These included, among others, a proposed change in the formula for adjusting wages to the cost of living, increases in premium pay and vacation benefits, an extension of the scope of the arbitration clause, and changes which would give an increased em-

[1] "§ 158. Unfair labor practices.

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * * * * *

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S.C.A. § 158.

[2] Negotiations covering salaried employees were also being conducted at this time, but since these were largely contingent upon the discussions concerning the hourly-paid employees, we shall concern ourselves only with the hourly-paid unit.

phasis to seniority in determining layoffs. The following day the company presented its proposed new contract (described as the White Book in the record), together with a written statement explaining its position. This detailed plan included elimination of the cost of living adjustment, a reduction in premium pay, limitations on the scope of the arbitration clause, and alterations in the grievance procedure. The latter contained a clause requiring the signature of each employee involved before a grievance could be processed. The reason assigned for this was that "under our current agreement we have been flooded with grievances." The thrust of the company's explanatory statement was that competitive conditions necessitated these proposals. Discussion of the basic wage structure was postponed pending resolution of these issues.

The parties conferred frequently during the next few weeks but there was little progress in the bargaining. The company stressed the economic cost of the union's proposals, while the latter rejected this argument on the ground that the employer was not in a competitive business to any substantial degree. On July 28, 1959, Bethlehem informed the union that if no agreement were reached by July 31 (the termination date of the 1956 contract), it would discontinue the grievance and arbitration procedure provided for in the old contract, would no longer give preferential seniority to union representatives, and would not comply with the union shop and checkoff clauses. Since no agreement was reached by August 1st, this was done.

On August 11, the company informed the union and the employees that it was putting into effect all of its White Book proposals with respect to the hourly-paid unit, except, inter alia, those relating to arbitration,

preferential seniority, and the union shop and checkoff. This plan was effectuated August 13, 1959. A strike followed in January 1960, and was still in existence at the time of the hearing before the trial examiner in March of that year.

The trial examiner found that Bethlehem had violated §8(a)(5) and (1) by insisting on the clause requiring the signature of individual employees on grievances. However, he concluded that none of the other acts of the company were unlawful, and further determined that the employer was not guilty of subjective bad faith in its course of conduct throughout the negotiations. The unilateral changes of August 13 were held not to constitute an unfair labor practice because the parties by this time had reached an impasse in bargaining.

Initially, the Board adopted the conclusions and recommendations of the trial examiner. 133 N.L.R.B. 1347 (1961). However, in a supplemental decision, 136 N.L.R.B. 1500 (1962), it found that the company had also violated § 8(a)(5) by depriving union representatives of their seniority rights and by unilaterally abandoning the grievance procedure of the expired contract and substituting its own procedure in lieu thereof. The Board adhered to its prior conclusion that the totality of Bethlehem's conduct did not evince bad faith bargaining.

At the threshold, Bethlehem urges that it was relieved of any obligation to bargain with the union because the latter's demands covered an inappropriate unit, i.e., one which included personnel classifiable as supervisors, and thus not within the purview of the statute. See 29 U.S.C.A. §152(3). This challenge relates to the union's proposal that the bargaining unit include both hourly-paid and salaried "snappers". The parties had agreed in the 1956 contract that the former should be included

and the latter excluded. Bethlehem now asserts that both are supervisors.

[1] We agree, as did the Board, with the trial examiner that "this is more an apparent than a real issue in this case," and that "placement of the snappers could in no event affect any of the issues raised by the complaint." Indeed, as the examiner noted, "The Respondent [Bethlehem] also conceded that whether the snappers in question be included in the bargaining unit or excluded, in either event the Union in fact represented a majority of the employees at all times, as it does now." In these circumstances, we think the employer's position is not tenable. *Brewery & Beverage Drivers Local 67 v. NLRB*, 103 U.S. App. D.C. 190, 257 F.2d 194 (1958).

Bethlehem's more fundamental contentions are that its grievance-signatory plan, and its discontinuance of preferential seniority for union officials and abandonment of the grievance and arbitration machinery at the expiration of the 1956 agreement did not violate the statute.

With respect to the grievance-signatory plan, the company advances two arguments: (1) there is no evidence that this was made a condition of reaching agreement; and (2) the proposal is a mandatory subject of bargaining. The record and the findings of the trial examiner make it abundantly clear that Bethlehem vigorously insisted that the substance of this proposal be incorporated in any new labor contract. But the employer urges that at no time did it state this was a *sine qua non* of agreement. It says that since, as hereinafter more fully discussed, the Board found that there was an impasse on all disputed matters, it could not have concluded that insistence on this particular clause barred an accord.

[2, 3] The argument does not withstand analysis. It was not necessary for the Board to find that the company's insistence on this proposal was the sole cause of the failure to reach agreement. If the proposal is not a mandatory bargaining subject, insistence upon it was a per se violation of the duty to bargain. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 78 S. Ct. 718, 2 L. Ed. 2d 823 (1958); *NLRB v. Davison*, 318 F.2d 550 (C.A. 4, 1963). Any other rule would permit insistence upon a non-mandatory item so long as there were any dispute as to mandatory topics. As the Supreme Court held in *Borg-Warner*, 356 U.S. at 349, 78 S. Ct. at 722:

> "We agree with the Board that such conduct [insistence on a non-mandatory topic] is, in substance, a refusal to bargain about the subjects that are within the scope of mandatory bargaining."

[4] We turn now to the second aspect of the employer's argument on this point, i.e., the proposal is a mandatory bargaining subject. In accordance with § 8(d) of the Act,[3] the Supreme Court has defined mandatory subjects as those within the phrase "wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *NLRB v. Wooster Division of Borg-Warner Corp.*, supra. It is clear to us that Bethlehem's proposal does not come within the scope of that phrase. Although at first glance it might appear to be a "condition of employment," actually the effect of the proposal is to limit

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[3] "§ 158. Unfair labor practices

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." 29 U.S.C.A. § 158.

the union's representation of the employees and not to condition the employees' employment. Cf. *NLRB v. Davison*, supra.

Under § 9(a) the union is the exclusive representative of the employees "in respect to rates of pay, wages, hours of employment, or other conditions of employment." 28 U.S.C.A. § 159(a). Bethlehem's proposal which would restrict the union's role in the prosecution of grievances to those complaints which had been signed by individual employees clearly limits this representation. The company acknowledges the union's rights with respect to the prosecution of grievances, but seeks solace in the proviso of § 9(a) which grants individual employees the right to adjust grievances without the intervention of the representative so long as the adjustment is not inconsistent with the collective bargaining contract.

[5] We find nothing in this section to support the company's position. Indeed, the proviso itself requires that the union be given opportunity to be present at the adjustment. In short, the fact that individual employees have the right to adjust their own grievances does not mean that an employer can restrict the union's statutory rights by requiring that each grievance be signed by the employee involved. Such a limitation is not within the statutory definition of mandatory bargaining subjects. Like the pre-strike ballot clause in *Borg-Warner*, "it substantially modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representatives." 356 U.S. at 350, 78 S. Ct. at 723. As the Board cogently points out in its brief, such a clause would pre-

clude the union from prosecuting flagrant violations of the contract merely because the employee involved, due to fear of employer reprisals, or for similar reasons, chose not to sign a grievance. Hence, redress for a violation would be made contingent upon the intrepidity of the individual employee.

[6] The fact that there are other labor contracts in this industry requiring employee signatures on grievances is not significant. Non-mandatory subjects may lawfully be included in collective bargaining contracts if the parties agree to them. *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. at 349, 78 S. Ct. at 722. Bethlehem's reliance on *Elgin, Joliet & Eastern Railway v. Burley*, 325 U.S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), aff'd, 327 U.S. 661, 66 S. Ct. 721, 90 L. Ed. 928 (1946), is misplaced. That case simply holds that a bargaining representative can compromise accrued monetary claims of individual employees only if the employees have authorized it to do so.

[7] The Board concluded that Bethlehem did not violate the statute when, upon the expiration of the 1956 agreement, it discontinued enforcement of the union shop and checkoff. In this court the union does not seriously press its contention that this was error. In any event, we agree with the reasoning of the Board. The right to require union membership as a condition of employment is dependent upon a contract which meets the standards prescribed in § 8(a)(3). The checkoff is merely a means of implementing union security. Since there was no contract in existence when the company discontinued these practices, its action was in conformity with the law. Cf. *NLRB v. International Union, United Automobile Workers*, 297 F.2d 272 (C.A. 1, 1961); *Communications Workers v. NLRB*, 215 F.2d

835, 839 (C.A. 2, 1954). Moreover, the checkoff clause of the 1956 contract expressly provided that it should remain in effect only so long as the agreement was extant.

Bethlehem makes a tripartite challenge to the Board's determination that the company violated § 8(a)(5) by unilaterally abrogating the preferential seniority rights of union representatives and by altering the prior grievance procedure. It urges that its action was a legitimate use of economic pressure, that these matters are not mandatory bargaining subjects, and that they, like the union shop and checkoff provisions, cannot be enforced unless there is an agreement in effect.

Clearly, the first argument is contingent upon the validity of the second, i.e., whether the company made a permissible use of economic weapons depends upon whether these matters are mandatory bargaining subjects, and thus not subject to unilateral change.

[8-10] We agree with the Board that both seniority rights and a grievance procedure are within the phrase "wages, hours, and other terms and conditions of employment" and hence are mandatory bargaining subjects.[4] *NLRB v. Proof Co.*, 242 F.2d 560 (C.A. 7, 1957) (seniority); *NLRB v. Century Cement Mfg. Co.*, 208 F.2d 84 (C.A. 2, 1953) (grievance procedure and seniority). See also, *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577-585, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-337, 73 S. Ct. 681, 97 L. Ed. 1048 (1953); *Aeronautical Industrial District Lodge 727 v. Campbell*, 337 U.S. 521, 528, 69 S. Ct. 1287, 93 L. Ed. 1513 (1949); Annot. 12 A.L.R.2d 265, 272-273. Accordingly, the company's unilateral action with respect

[4]The Board properly rejected the examiner's holding that these topics though mandatory bargaining subjects, are not terms and conditions of employment. As we have previously indicated, the latter is merely a part of the statutory definition of the former.

to them was unlawful. *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962). The fact that there was no agreement in effect at the time does not alter our conclusion. As we have previously stated, Bethlehem was justified in discontinuing enforcement of the union shop and checkoff because these conditions are wholly dependent upon the existence of an agreement conforming to the § 8(a)(3) proviso. The company's abrogation of seniority rights and its alteration in the grievance and arbitration procedure, however, finds no such protection in the statute. The vice in this was not the refusal to comply with the provisions of an agreement which had already expired, but the unilateral elimination of accrued seniority rights, and the substitution of a new employer-devised grievance procedure in lieu of the one which existed under the expired contract.

[11] Two additional contentions of the employer merit only brief comment. It is said that because the union was given notice of these proposed changes and an opportunity to bargain with respect thereto, Bethlehem was justified in implementing them on August 1st. But the employer concedes that it was not until July 28 that the union was notified that these changes were to be effected only three days later. Until that time the company's own proposed contract included provisions for preferential seniority and a formal grievance procedure. In this setting, it can hardly be said that the union was given the bargaining opportunity to which it is entitled under *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); and *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 69 S. Ct. 960, 93 L. Ed. 1320 (1949). Similarly wanting in merit is the argument that the changes were permissible because "purely temporary and not for the purpose of effecting a permanent change in terms of employment, but for the purpose of putting

legitimate economic pressure on the Union." Regardless of how characterized, the changes altered conditions of employment and were therefore unlawful.

The union urges that the company's unilateral imposition of the White Book on August 13, 1959, constituted a per se violation of § 8(a)(5). Additionally it makes a broad frontal attack on the failure of the Board to find Bethlehem guilty of bad faith bargaining during the entire course of the 1959 negotiations. Because we hold that the Board's determination that Bethlehem was legally justified in imposing its own terms and conditions of employment on August 13 was premised on an erroneous view of the law, we find it unnecessary to consider the union's alternative argument.

[12, 13] The Board concedes that the employer's action of August 13 would ordinarily constitute a violation of the Act as a matter of law. *NLRB v. Katz*, 369 U.S. 736, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962); *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 69 S. Ct. 960, 93 L. Ed. 1320 (1949); *May Dept. Stores Co. v. NLRB*, 326 U.S. 376, 66 S. Ct. 203, 90 L. Ed. 145 (1945); *Quaker State Oil Refining Corp. v. NLRB*, 270 F.2d 40, 45-46 (C.A. 3), cert. denied, 361 U.S. 917, 80 S. Ct. 261, 4 L. Ed. 2d 185 (1959); *NLRB v. George P. Pilling & Son Co.*, 119 F.2d 32, 38 (C.A. 3, 1941). It urges, however, that the parties by this time had reached a bargaining impasse, thereby justifying unilateral action.[5] But it is manifest that there can be no legally

[5] In addition to contesting the Board's finding on this score, the union argues that the necessary inference in it is that the impasse arose between August 1 and August 11. The basis for this is that if there were a bona fide impasse prior to August 1, the Board could not have found that Bethlehem violated the Act by its actions on that date. In its brief the Board questions this rationale, but at oral argument counsel for the Board was unable to state at what point the impasse occurred. Because of our decision, we find it unnecessary to determine this issue. We might note, however, that logic supports the union's position.

cognizable impasse, i.e., a deadlock in negotiations which justifies unilateral action,[6] if a cause of the deadlock is the failure of one of the parties to bargain in good faith. *NLRB v. Yutana Barge Lines, Inc.*, 315 F.2d 524, 529-530 (C.A. 9, 1963); *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 234 (C.A. 5, 1960); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 136 (C.A. 9, 1949); *Vanneette Hosiery Mills*, 114 N.L.R.B. 1107, 1126 (1955). See also, *NLRB v. Crompton-Highland Mills, Inc.*, supra, and Bowman, An Employer's Unilateral Action—An Unfair Labor Practice?, 9 Vand. L. Rev. 487, 501 (1955-1956). Here, the company was guilty of acts which the Board forcefully contends, and we have held, to be a violation of its duty to bargain less than two weeks before the August 13 changes. Not only was this prior action unlawful, but it consisted of the very conduct, a unilateral alteration in the conditions of employment, which the Board now asserts was justified on August 13.

The sole reason advanced for the finding of an impasse is that the union had also adopted an attitude of "fixed and stoney inflexibility" and that, "[a]s the days wore on, adamancy only became stronger and stronger." In the words of the trial examiner:

> "With this sort of testimony by the Union witnesses themselves, and the complete failure to reach agreement on anything worth speaking about after all these negotiating sessions, there is no doubt that the parties were finished with talking. They were at an absolute impasse."

But it is not contended that the union's adamant position was in any sense a violation of its duty to bargain.

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[6] Although the parties have used the term *impasse* rather loosely to describe any deadlock in negotiations, regardless of how caused, we shall employ it in this opinion only in this strict legal sense.

Indeed, in view of the company's unlawful insistence on its grievance-signatory plan and its unilateral alteration of the conditions of employment on August 1st, the union's position was completely justified. In this regard, our decision in *NLRB v. International Ladies' Garment Workers' Union*, 274 F.2d 376, 78 A.L.R. 2d 963 (C.A. 3, 1960), is particularly apposite. We there held that a union was justified not merely in maintaining an adamant position at the bargaining table, but in refusing to negotiate with a representative of an employer's association who had previously held union office. Thus the Board in this case failed to view the union's inflexible position and the August 13 imposition of the White Book in the light of the company's prior violations of its duty to bargain.

Despite its determination that the company's action of August 1st was so inimical to our national labor relations policy as to constitute a per se violation of the Act, the Board now contends that this was only a "technical violation." But such a euphemistic description cannot be so easily employed to reconcile the inconsistency in logic in the Board's decision. The fact remains that the August 1st changes were unfair labor practices as a matter of law. Moreover, not only had the company not purged itself of its earlier violations by the time it implemented the White Book on August 13, but it concedes, and the record shows, that it did not institute its new grievance plan until that very day.

There are additional factors which conclusively refute the Board's contention, pressed at oral argument, that the "technical" violations of August 1st were innocently committed. In a prior case the Board held that Bethlehem had violated § 8(a)(5) in 1947 by insisting on a proposal which would give each employee the right to take up a grievance with his foreman without the un-

ion steward being present. In the Matter of Bethlehem Steel Company, Shipbuilding Division, 89 NLRB 341, (1950), reversed on other grounds, 191 F.2d 340, (D.C. Cir. 1951). A stipulation of the parties reveals that in 1956 the company suspended the seniority rights of union officials as well as the procedure for the adjustment of grievances. The union thereupon filed unfair labor practice charges. When a new contract was executed these charges were withdrawn pursuant to a memorandum of agreement. Considering the similarity between its prior conduct and that presented here, it cannot be said that the company was unaware of the questionable nature of its action.

The Board cites *NLRB v. Katz*, 369 U.S. 736, 741-742, 82 S. Ct. 1107, 8 L. Ed. 2d 230 (1962), for the proposition that whether an impasse exists is a question of fact for its determination. Certainly whether the parties have reached a deadlock in negotiations is a factual matter, but whether such a deadlock legally justifies a unilateral alteration in the conditions of employment is at the very least a mixed question of law and fact.

The union urges that we direct the Board to include in its order a "back pay" award to those employees who were injured by the company's action. However, because we hold only that the Board erred in law in failing to give proper consideration to the circumstances, particularly the unfair labor practices, which preceded the imposition of the White Book, we shall remand the case for further consideration in the light of this opinion. Of course, this is to include the issuance of an order which will effectuate the policies of the Act.

The petition for enforcement will be denied and the cause remanded for further proceedings in conformity with this opinion.

APPENDIX B

Decree Below

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,052

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Intervenor.

No. 14,102

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Intervenor.

DECREE

Before:

STALEY, HASTIE and SMITH, CIRCUIT JUDGES.

THIS CAUSE came on to be heard upon petitions to review, and upon cross-petition for enforcement of, a certain order of the National Labor Relations Board issued by it against Bethlehem Steel Company (Shipbuilding Division), its officers, agents, successors, and assigns, on April 25, 1962. The Court heard argument of respective counsel on May 21, 1963, and has considered the briefs and transcript of record filed in this cause. On July 30, 1963, the Court, being fully advised in the premises, handed down its opinion denying enforcement of the Board's order and remanding the case to the Board for further proceedings in conformity with the Court's opinion.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Third Circuit that enforcement of the said order of the National Labor Relations Board directed against Bethlehem Steel Company (Shipbuilding Division), its officers, agents, successors, and assigns, be and it hereby is denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that this cause be remanded to the National Labor Relations Board for further proceedings consistent with the Court's said opinion.

BY THE COURT

STALEY

Circuit Judge

Dated: August 21, 1963

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
I. The Board's findings of fact	3
A. Introduction	3
B. The proposals of the parties	3
C. The course of negotiations between the parties	5
D. Petitioner's unilateral action and the ensuing strike	8
II. The Board's conclusions and order	9
III. The court of appeals decision	10
Argument	11
Conclusion	19

CITATIONS

Cases:

National Labor Relations Board v. *American National Insurance Co.*, 343 U.S. 395	15, 17
National Labor Relations Board v. *Herman Sausage Co.*, 275 F. 2d 229	12
National Labor Relations Board v. *Insurance Agents*, 361 U.S. 477	14
National Labor Relations Board v. *Katz*, 369 U.S. 736	14
National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898	18

715-189—63——1

Cases—Continued

National Labor Relations Board v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 ..... 15, 16, 17, 18
National Labor Relations Board v. *Yutana Barge Lines, Inc.*, 315 F. 2d 524 12
North American Aviation, Inc., 16 L.A. 744 17
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474 18

Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) 2
Section 8(a)(1) 9
Section 8(a)(5) 9, 10, 13, 14

Miscellaneous:

Cox, *Labor Decisions of the Supreme Court at the October Term 1957*, 44 Va. L. Rev. 1057 (1958) 16
Fleming, *The Obligation to Bargain in Good Faith*, 47 Va. L. Rev. 988 (1961) 16
Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 N.Y.U. Conf. Lab. 39 (1959) 16

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 595

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION), PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL–CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–14)[1] is reported at 320 F. 2d 615. The findings of fact, conclusions of law, and order of the Board (J.A. 3a–97a) are reported at 133 NLRB 1347 and 136 NLRB 1500.

[1] "J.A." references are to the Joint Appendix printed for the use of the court below; references preceding a semicolon are to the Board's findings, and succeeding references are to the supporting evidence.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 1963 (Pet. App. B). The petition for a writ of certiorari was filed on October 31, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sections 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Whether, in view of the remand ordered by the court of appeals, the questions raised by the petition are premature.

2. If the first question is answered negatively, these further questions are reached: Whether petitioner refused to bargain in violation of the National Labor Relations Act by—

a. Insisting that the union agree to a grievance procedure which required the signature of individual employees on grievances; and

b. Withdrawing top seniority from union representatives and altering the grievance procedure after the termination date of collective bargaining agreements dealing with these subjects, without first giving the union an adequate opportunity to negotiate about the changes.

STATUTE INVOLVED

The provisions of Section 8(a)(5) and 8(d) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth on pp. 3–4 of the petition.

STATEMENT

I

THE BOARD'S FINDINGS OF FACT

A. INTRODUCTION

This case arose out of negotiations in 1959 between petitioner and the Union [2] for new collective bargaining agreements covering units of hourly-paid and salaried employees at some of the Company's shipyards.[3] Negotiations began several weeks prior to the termination date of the existing contracts—July 31, 1959—and continued thereafter. In January 1960, the parties not having reached an agreement, the employees in both units went out on a strike; the strike was continuing at the close of the Board hearing in March 1960 (J.A. 7a; 551a, 193a).

B. THE PROPOSALS OF THE PARTIES

During the first three negotiating sessions, in early July 1959, the parties exchanged their respective written demands (J.A. 24a–26a; 541a–542a, 657a–841a, 103a). The Union's proposals included, *inter alia*, certain economic betterments,[4] changes in the con-

[2] Industrial Union of Marine and Shipbuilding Workers of America, AFL–CIO.

[3] Two agreements were involved, one covering hourly-paid employees and the other covering salaried employees. The parties expected that any agreement reached as to the hourly-paid employees would form the basis for negotiations as to the salaried unit (J.A. 31a; 538a–539a, 103a). The issues are virtually the same with respect to both units. Unless otherwise indicated, all references are to the bargaining for hourly-paid employees.

[4] These included changes in the contractual formula for adjusting wages to the cost of living, in premium pay, and in

tractual seniority provisions so as to increase the weight to be given seniority in determining retention rights during layoffs, and amendment of the contractual grievance clause so as to make incentive rates for new jobs subject to the arbitration procedure (J.A. 21a–23a; 110a–115a, 743a–758a, 103a). Petitioner's proposals (sometimes called the "White Book") included, *inter alia,* reduction or elimination of certain economic benefits afforded by the expiring contract,[5] changes in the seniority provisions of the contract so as to lessen the weight to be given seniority in determining an employee's right to employment during layoffs, and certain changes in the contractual grievance procedure (J.A. 12a–21a, 298a–299a, 320a, 437a–447a, 479a–487a).

Respecting the grievance procedure, petitioner sought a provision which required the Union, before it could process a grievance, to obtain the signature of the individual employee or employees involved (J.A. 17a; 810a, 729a, 130a, 169a). Moreover, its proposals restricted the permission accorded union representatives (including union stewards) to leave work to investigate grievances and to confer with the foremen about them (J.A. 16a; 446a–447a, 615a–616a, 733a–734a, 820a–821a, 266a, 178a–179a, 103a); sub-

vacation benefits; an increase in the number of paid holidays and in holiday pay; and an upward reclassification of a number of job categories.

[5] These included elimination of the provision for adjustment of wages in accordance with the cost of living (without, however, any change in the wage scale actually being paid), and diminution or elimination of certain kinds of premium pay and some employees' vacation pay.

stantially reduced the time available to the Union for appealing grievances (J.A. 16a–17a; 608a–612a, 730a–731a, 810a–816a, 103a, 442a); required the Union to submit a written statement at each step of the grievance proceeding setting out the facts upon which the grievance was based, the name of the employee aggrieved, and the name of any other employee allegedly favored in violation of the contractual agreement (J.A. 17a; 810a, 811a, 814a, 443a); and required the appeal to arbitration to be accompanied by a written statement from the Union setting out the factual basis for the complaint and the Union's position in the dispute (J.A. 17a; 816a, 731a, 103a). In addition, petitioner proposed some contract language which was designed to eliminate the existing practice of determining the merits of grievances by reference, not only to the terms of the contract itself, but to prior arbitration awards as well (J.A. 14a; 117a–118a, 122a, 138a, 209a–211a, 298a–299a, 320a, 691a, 740a–741a, 103a).

C. THE COURSE OF NEGOTIATIONS BETWEEN THE PARTIES

After exchanging proposals, the parties engaged in a number of negotiating sessions (J.A. 26a–27a; 539a–540a, 103a). Throughout the negotiations, petitioner took the position that it needed the concessions demanded by it, and could not grant the Union's proposals, because the business of its East Coast shipyards was then in decline and competition was becoming more severe (J.A. 24a–25a, 27a; 657a–689a, 120a–123a, 135a–136a, 214a–215a, 220a–221a, 223a, 231a, 298a–301a, 449a–450a, 395a–428a, 431a–435a).

The Union, in turn, rejected practically all of petitioner's proposals, contending that petitioner's business was largely noncompetitive[6] and thus that there was no substance to petitioner's claim that it needed to reduce labor costs (J.A. 27a–28a; 140a–141a, 154a–155a, 157a, 175a, 214a–215a, 271a, 294a–295a, 306a–307a, 357a–358a). The parties failed to reach agreement on any significant issue (J.A. 30a; 347a–348a, 451a).

Petitioner asserted that it sought the provision requiring employee signatures on grievances (p. 4, *supra*), so that it could "identify the employee and place the responsibility." The Union pointed out that the existing procedure accomplished this objective, for the Union always revealed the name of the employee involved (J.A. 169a, 312a). Petitioner replied, "that might be so, but this is the way the Company want[s] it" (*ibid.*). When the Union pointed out that it had the statutory right to file grievances without the employee's consent, petitioner again acknowledged "that might be so" but adhered to its proposal, stating that, if the Union had any other suggestions, it should make them (J.A. 169a, 265a, 312a–313a). The Union replied that it wanted to keep the con-

[6] Petitioner obtained a substantial amount of work on a negotiated-price basis (J.A. 108a, 141a, 155a, 390a–391a). Moreover, sometimes the government awarded petitioner contracts even though its bid had been relatively high, because of petitioner's demonstrated technical skill or its ability to meet delivery schedules, or in order to keep petitioner in operation as a going concern (J.A. 214a, 468a, 849a, 854a, 856a–858a, 185a).

tract as it was, but petitioner said that it was not interested in continuing the past practice (J.A. 169a, 265a, 313a).

The Union then pointed out that some employees might be afraid to sign a grievance form because this would "get [them] in wrong with the foreman." The Union added that it might be physically impossible for it to get the form to the employees within the limitation period set out in the grievance procedure, particularly if the grievance was based on the layoff of or failure to recall a number of employees; for in that case the employees would be available only at their own homes or they might even be outside the commuting area (J.A. 169a, 280a–281a, 313a). Petitioner answered that it "realized there would be some practical problems, but that [it] could see nothing to be gained by further discussion. The Company felt that this proposal would solve its problems" (J.A. 170a, 313a).

The discussion of the other aspects of petitioner's grievance proposal was similarly unfruitful. The Union told both petitioner and the employees that, in its view, petitioner's grievance procedure proposals were intended to, and would, destroy good industrial relations at the yards (J.A. 264a–265a, 899a–900a, 199a). The Union repeatedly insisted that petitioner was bargaining in bad faith with respect to both the grievance procedure and the other contract issues between the parties (J.A. 129a, 147a, 148a, 264a, 307a, 889a–892a).

715-199—68——2

D. PETITIONER'S UNILATERAL ACTION AND THE ENSUING STRIKE

On July 28, 1959, petitioner orally advised the Union that if no agreement were reached by July 31, the termination date of the 1956 contracts, it would discontinue compliance with certain provisions of the contracts. These included the clauses giving top seniority to union representatives and providing for the union shop and check off clauses (all of which were provided for in both petitioner's and the Union's proposals for a new contract), and the contractual grievance and arbitration procedure (J.A. 34a; 145a–146a). On August 1, no agreement having been reached, petitioner ceased giving effect to those provisions (J.A. 34a–35a; 543a–544a, 178a–180a, 305a, 310a–312a, 103a). On that date, petitioner laid off a number of union stewards without according them top seniority, and refused to accept new grievances which the Union sought to file under the former contractual procedure (J.A. 279a–281a, 543a–544a, 103a).

On August 11, 1959, petitioner announced to the Union and to the employees that it was putting into effect most of its proposals with respect to the hourly-paid unit (but not the salaried unit), but not the arbitration clause in its proposed grievance procedure, the provision calling for top seniority for union representatives, and the union shop and checkoff clauses (J.A. 32a–37a; 545a–546a, 843a–847a, 160a, 103a). Petitioner put the new conditions into effect two days later, on August 13 (J.A. 36a–37a; 545a–547a, 103a, 153a–154a, 180a–185a).

In January 1960, the parties still not having reached an agreement, both the hourly-paid and the salaried

employees went out on strike at all of the yards where the employees were represented by the Union (J.A. 7a; 551a, 103a).

II

THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by insisting on a provision which required the signature of individual employees on grievances, and by unilaterally abandoning, on August 1, 1959, the provisions of the 1956 contracts with respect to the grievance procedure and top seniority for union representatives (J.A. 88a, n. 2, 91a–92a).[7] However, the Board found that petitioner did not violate the Act by discontinuing the union-shop and checkoff provisions of the 1956 contracts after their termination dates, and by unilaterally putting its contract proposal with respect to the hourly-paid employees in effect on August 13, 1959 (J.A. 90a–91a, 89a). In making the latter finding, the Board adopted without comment the Trial Examiner's conclusion that the Union's "adamant" opposition to petitioner's proposals, and the parties' failure to agree on any material issue after a number of bargaining sessions, established that they had reached an "absolute impasse" (J.A. 55a–57a). The Board dismissed the complaint insofar as it alleged that petitioner had not bargained in good faith. The Board found that, although "several particular aspects of [petitioner's] behavior were

[7] One Member dissented with respect to the second finding (J.A. 95a).

unlawful, considering the totality of [petitioner's] conduct we are unable to conclude that [petitioner] did not honestly endeavor to reach an agreement" (J.A. 88a–89a).

The Board's order (J.A. 93a–97a) directs petitioner to cease and desist from the unfair labor practices found, and in any like or related manner from interfering with its employees in the exercise of their statutory rights. Affirmatively, it requires petitioner to bargain with the Union on request, and to post appropriate notices.

III

THE COURT OF APPEALS DECISION

The Company and the Union each sought review of the portions of the Board's order adverse to it.

The court of appeals agreed with the Board that petitioner violated Section 8(a)(5) of the Act by insisting on its grievance signature proposal and by unilaterally abandoning the provisions of the 1956 contracts governing the grievance procedure and providing top seniority for union representatives (Pet. App. 5–11).[8] The court held, however, that the Board had not given an adequate rationale for its conclusion that petitioner did not violate the Act by unilaterally putting into effect on August 13, 1959, its contract proposals with respect to the hourly-paid employees. The court pointed out that the only reason given by the Board for concluding that an impasse existed was

[8] The court also agreed with the Board that petitioner did not violate the Act by suspending enforcement of the union-shop and checkoff clauses of the 1956 contracts after those contracts terminated (Pet. App. 8–9).

that the Union had adopted an inflexible bargaining position (Pet. App. 12). The court stated that the Union's position should have been evaluated in the light of petitioner's prior unfair labor practices; and that the Board, in assessing whether an impasse existed which was legally sufficient to justify unilateral action, should have considered the effect of the petitioner's unfair labor practices upon the Union's bargaining position (Pet. App. 13–14). The court therefore found it unnecessary to consider the Union's alternative argument that the Board erred in failing to find petitioner guilty of subjective bad faith bargaining during the entire course of the 1959 negotiations (Pet. App. 11).

The court remanded the case to the Board "for further consideration in the light of this opinion" and for "the issuance of an order which will effectuate the policies of the Act" (Pet. App. 14).

ARGUMENT

The petition is premature. The questions which it raises may either be rendered academic or be presented in a different posture after the Board has reconsidered the case on the remand* and its action has been reviewed by the court of appeals. In any event, the decision of the court of appeals is correct.

1. Contrary to petitioner (Pet. 20), the court below in directing the remand did not hold that petitioner violated the Act by unilaterally putting its contract proposals into effect on August 13, 1959. The court found that the Board had determined the unilateral

* The Board has decided to accept the remand.

action to be proper solely on the ground that it occurred after there had been an impasse in the bargaining and without considering whether the impasse was caused by petitioner's prior unfair labor practices; the court has merely directed the Board to consider the latter question.[10] On such consideration, the Board may find that the prior unfair labor practices contributed to the impasse, or it may find that they did not. If the Board makes the latter finding, it could reaffirm its earlier holding that petitioner's action in unilaterally putting into effect its contract proposals was not unlawful. If this holding were then sustained by the court of appeals, the third question raised by the petition—whether petitioner violated the Act by unilaterally putting its proposals into effect (Pet. 3)—would become academic. That question would be presented only if the Board were to find that the prior unfair labor practices did contribute to the impasse, or if the court of appeals were to reverse a contrary Board finding.

Moreover, the predicate for the other unfair labor practice findings may be altered as a result of the remand and the subsequent review by the court of appeals. The Board found, and the court below agreed, that petitioner's insistence on the grievance-signature proposal and its action in unilaterally

[10] It is well settled that an impasse caused by the employer's unfair labor practice affords no justification for his taking unilateral action. See *National Labor Relations Board* v. *Yutana Barge Lines, Inc.*, 315 F. 2d 524, 529–530 (C.A. 9); *National Labor Relations Board* v. *Herman Sausage Co.*, 275 F. 2d 229, 234 (C.A. 5).

discontinuing the former grievance procedure and super-seniority for union representatives constituted refusals to bargain, in violation of Section 8(a)(5) of the Act, even though petitioner had manifested good faith in the bargaining negotiations. The court did not reach the Union's contention that petitioner had not negotiated in good faith. If the Board were now to find that petitioner's unilateral action on August 13 constituted a further refusal to bargain, this might lead it to reevaluate, and perhaps to change, its view respecting petitioner's general good faith. Or, even if the Board were to adhere to its original position on that question, the court of appeals might decline to sustain the Board's good-faith finding.

Should the Board or the court of appeals find that the negotiations were not in fact conducted in good faith, it would follow that the totality of petitioner's conduct at the bargaining table was violative of the Act, and it would be unnecessary for this Court to consider whether part of that conduct—*i.e.*, demanding employee signatures on grievances, and discontinuing the grievance procedure and superseniority for union representatives—would be unlawful by itself, and irrespective of petitioner's good faith.

On the other hand, were the Board to adhere to its view that there was general good faith in the negotiations, and were the court of appeals to sustain that finding, petitioner would then have full opportunity to seek review here of the question whether those actions, standing alone, constitute an unlawful refusal to bargain.

2. Even if the case were ripe for review, we submit that the petition should be denied.

(a) Petitioner attacks on two grounds the finding that its action on August 1, 1959, in discontinuing superseniority for union representatives and the former grievance procedure was unlawful: (i) its action did not amount to a unilateral setting of conditions of employment, but merely constituted a form of temporary economic pressure designed to force the Union to accede to petitioner's contract demands; and (ii) the action was not taken unilaterally since the Union was given an adequate opportunity for discussion (Pet. 16–19). There is no substance to either of these contentions.

(i) As the court below properly observed (Pet. App. 11), regardless "of how characterized, the changes altered conditions of employment." To alter those conditions even temporarily, without first notifying and discussing the matter with the bargaining representative, violates Section 8(a)(5) of the Act. For, it "does amount to a refusal to negotiate about the affected conditions of employment" at least for the period while the changes are operative, "and must of necessity obstruct [further] bargaining." *National Labor Relations Board* v. *Katz*, 369 U.S. 736, 747. This conclusion is entirely consistent with *National Labor Relations Board* v. *Insurance Agents*, 361 U.S. 477. As *Katz* recognized (369 U.S. at 747), the partial strike tactics in *Insurance Agents*, unlike the unilateral changes here and in *Katz*, "had not in

any way whatever foreclosed discussion of any issue, by unilateral actions or otherwise." [11]

(ii) Petitioner's contention that it gave the Union notice of the proposed changes and an opportunity to bargain about them is refuted by the record. As the court below pointed out (Pet. App. 10): "But the employer concedes that it was not until July 28 that the union was notified that these changes were to be effected only three days later. Until that time the company's own proposed contract included provisions for preferential seniority and a formal grievance procedure. In this setting, it can hardly be said that the union was given the bargaining opportunity to which it is entitled under *NLRB* v. *Katz* * * *."

(b) The holding of the Board, affirmed by the court below, that petitioner violated the Act by insisting that grievances be signed by the individual employees presents a more substantial question. The Act requires the employer and the employees' representative to bargain with each other in good faith with respect to "wages, hours, and other terms and conditions of employment"; within that area neither party is legally obligated to yield. *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. On the other hand, the Court held in *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, that there is a class of lawful bargaining subjects which fall outside the area of

[11] Petitioner's contention that the changes were merely intended as economic pressure on the Union is inconsistent with its disavowal of any "threat" when it first advised the Union of its intention to effect the changes in question (see J.A. 146a).

"wages, hours, and other terms and conditions of employment"; that the parties may bargain about these subjects if they choose; but, that if the parties are unable to agree on them, the disagreement cannot lawfully be made the basis for refusing to enter into a contract covering subjects within the area of mandatory bargaining. The reasoning in *Borg-Warner* has been criticized,[12] but the Court's holding is plain. The Board, which believes the reasoning to be sound, and the court below were plainly entitled to follow it.

The *Borg-Warner* case is therefore decisive if petitioner's proposal that the Union be barred from presenting grievances not signed by individual employees fell outside the area of compulsory bargaining. The Board and court below so held, but the question is debatable. Since a grievance procedure is a method of resolving questions relating to terms and conditions of employment and thus is clearly within the area of mandatory bargaining, it can fairly be argued that the subject is not removed from that area merely because the employer seeks to condition the use of the grievance procedure on obtaining the signature of the employee affected; for, like time limits on the filing and processing of grievances, this is a means of keeping the procedure from being abused (see Pet. 12). Moreover, a requirement that the employee sign the

[12] See, *e.g.*, Cox, *Labor Decisions of the Supreme Court at the October Term 1957*, 44 Va. L. Rev. 1057 (1958); Fleming, *The Obligation to Bargain in Good Faith*, 47 Va. L. Rev. 988, 993–1006 (1961); Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process*, 12 N.Y.U. Conf. Lab. 39, 49–50 (1959).

grievance or similar restrictions on the filing of grievances, is found in many collective bargaining contracts.[13] Not every contractual restriction upon the statutory powers of the bargaining representative is outside the area of permissible insistence. *E.g., National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395. Nevertheless, the Board finds the contrary arguments more persuasive. Any contractual requirement that a grievance be signed by an employe before it can be processed by the union, like the strike-vote proposal in *Borg-Warner*, has the effect of "weakening the independence of the 'representative' chosen by the employees" (356 U.S. at 350). As the court below pointed out (Pet. App. 7–8), it "would preclude the union from prosecuting flagrant violations of the contract merely because the employee involved, due to fear of employer reprisals, or for similar reasons, chose not to sign."[14] Moreover, it

[13] See J.A. 926a–985a; but cf. J.A. 1008a–1055a. See also *North American Aviation, Inc.*, 16 L.A. 744.

However, non-mandatory subjects may lawfully be included in collective bargaining contracts if the parties agree to them. See *Borg-Warner*, 356 U.S. at 359, dissenting opinion. Hence, the fact that a clause is in a contract does not necessarily establish that it could properly have been insisted upon had one of the parties opposed its inclusion.

[14] There are many provisions of a collective bargaining agreement, like union security and checkoff, which are primarily for the benefit of the union rather than the employee. It may be that an employee would not be interested in challenging breaches of those provisions, or it may be difficult to obtain the consent of every employee who would be affected thereby. Petitioner's proposal, however, required that the grievance be "signed by each Employee involved" (J.A. 810a), and petitioner explained that this meant that: "No grievance will be accepted in

detracts from the full recognition to which the bargaining agent is entitled, for in effect the agent would be required continually to prove its authority to represent and bargain for the employees (see J.A. 52a). Consequently, the Board submits that the grievance-signature proposal, no less than the strike-vote proposal in *Borg-Warner*, was outside the area of mandatory bargaining.

Petitioner's further contention that the record fails to show that it insisted upon its grievance-signature proposal as a condition of reaching an agreement (Pet. 14), presents only an evidentiary issue, which does not warrant review by this Court. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. In any event, the facts summarized in the Statement (pp. 5–7), show that petitioner made it clear that, notwithstanding the Union's contrary arguments, the grievance-signature proposal was something that the Company had to have, and it never retreated from that position; indeed, it put that proposal into effect when the prior contracts expired (p. 8, *supra*). In these circumstances, the Board was fully justified in finding that petitioner insisted on the grievance-signature clause as a condition of reaching an agreement and that such insistence was at least one cause of the impasse which resulted (J.A. 50a–51a, 62a). See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 236 F. 2d 898, 907 (C.A. 6), modified in other respects, 356 U.S. 342.

Step No. 1 unless it * * * is signed by the aggrieved employee or employees. General statements covering any and every employee are out" (J.A. 729a).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER TERM, 1963

BETHLEHEM STEEL COMPANY (SHIPBUILDING DIVISION),

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and

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO, IN OPPOSITION

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INDEX

PAGE

QUESTIONS PRESENTED 1

COUNTER-STATEMENT OF THE CASE 2

ARGUMENT 10

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT BETHLEHEM'S INSISTENCE ON ITS GRIEVANCE-SIGNING PROPOSAL THROUGHOUT THE ENTIRE NEGOTIATIONS WAS A VIOLATION OF THE ACT 10

II. THE COURT OF APPEALS CORRECTLY HELD THAT BETHLEHEM VIOLATED THE ACT ON AUGUST 1, 1959, BY UNILATERALLY ABOLISHING THE GRIEVANCE PROCEDURE AND THE "TOP SENIORITY" PROVISIONS OF THE 1956 CONTRACT 16

III. THE COURT OF APPEALS CORRECTLY HELD THAT, BY REASON OF BETHLEHEM'S IMMEDIATELY PRECEDING UNFAIR LABOR PRACTICES, THERE WAS, ON AUGUST 11, 1959, NO BONA FIDE IMPASSE IN THE BARGAINING AND THAT, ACCORDINGLY, BETHLEHEM'S UNILATERAL IMPOSITION OF THE WHITE BOOK ON AUGUST 13 CONSTITUTED AN UNFAIR LABOR PRACTICE AS A MATTER OF LAW 21

1. The Court Below Did not Invade the Board's Province of Fact Finding 21

2. The Court Below Did not Apply a Per Se Rule of Law in Holding that Since the Alleged Deadlock in Negotiations Was Preceded by Conduct Violative of Section 8(a)(5), Bethlehem's Unilateral Actions of August 13 Were, Therefore, Not Excused by a Bona Fide Impasse 23

3. The Court Below Did Not Condition the Privilege of Unilateral Action upon Lack of Prior Violations of Section 8(a)(5) 25

PAGE

4. Bethlehem Did Not Give the Union Adequate Notice of, or Opportunity to Bargain About the Unilateral Imposition of the White Book 27

5. Bethlehem's Violations of Section 8(a)(5) Preceding August 13 Were so Serious in Nature as to Make It Inconsistent with Section 8(a)(5) to Hold that the Imposition of the White Book Was Excusable 28

CONCLUSION 34

TABLE OF AUTHORITIES CITED

CASES:

Aeronautical Lodge v. Campbell, 337 U. S. 521 (1949) 17

Bernard L. Alpert, etc. v. Bethlehem Steel Co., etc., et als. (Civil No. 60-217-S, 1960) 9

Bethlehem Steel Company, 89 NLRB 341 (1950) ... 14

Bethlehem Steel Co. v. Kehoe, et al., In Equity, No. 76496, 43 Labor Cases, Par. 50, 373 (1960) 9

Carpinteria Lemon Assn. v. NLRB, 240 F. 2d 554 (9 Cir., 1956) 29

City Packing Co., 98 NLRB 1261 (1952) 29

Detroit Resilient Floor Decorators v. NLRB, 317 F. 2d 269 (6 Cir., 1963) 16

May Department Stores v. NLRB, 326 U. S. 376 (1945) 17, 25, 30

Metropolitan District Council of Carpenters, 137 NLRB 1583 (1962) 16

NLRB v. American National Insurance Co., 343 U. S. 395 (1952) 15

PAGE

NLRB v. Andrew Jergens Co., 175 F. 2d 130 (9 Cir., 1949) 29

NLRB v. Bradley Washfountain Co., 192 F. 2d 144 (7 Cir., 1951) 26

NLRB v. Century Cement Mfg. Co., 208 F. 2d 84 (2 Cir., 1953) 17

NLRB v. Crompton-Highland Mills, Inc., 337 U. S. 217 (1949) 17, 19, 20, 25, 28, 30, 31

NLRB v. Erie Resistor Corp., 373 U. S. 221 (1963) 18, 25

NLRB v. Insurance Agents' International Union, 361 U. S. 477 (1960) 18, 19, 23, 31

NLRB v. Katz, 369 U. S. 736 (1962) 17, 18, 19, 20, 22, 23, 25, 28, 31

NLRB v. George P. Pilling & Son Co., 119 F. 2d 32 (3 Cir., 1941) 17

NLRB v. Proof Co., 242 F. 2d 560 (4 Cir., 1957) 17, 19

NLRB v. Ross Gear & Tool Co., 158 F. 2d 607 (7 Cir., 1947) 17

NLRB v. Valley City Furniture Co., 230 F. 2d 947 (6 Cir., 1956) 17

NLRB v. Wooster Division of Borg-Warner Corp., 356 U. S. 342 (1958) 11, 12, 13, 14, 15, 16, 22, 25, 32

NLRB v. Yutana Barge Lines, Inc., 315 F. 2d 524, 529-530 (9 Cir., 1963) 29

Painters, Local 164 v. NLRB, 293 F. 2d 133 (C. A., DC, 1961); cert den. 368 U. S. 824 (1961) 16

Reed & Prince Mfg. Co., 96 NLRB 850 (1951) 29

Reed & Prince Mfg. Co. v. NLRB, 205 F. 2d 131 (1 Cir., 1953) 29

Universal Camera Corp. v. NLRB, 340 U. S. 474 (1951) 22, 23

Vanette Hosiery Mills, 114 NLRB 1107 (1956) 29

QUESTIONS PRESENTED.

1. Whether Petitioner Violated Section 8(a)(5) of the National Labor Relations Act by conditioning its willingness to enter into a collective bargaining agreement upon the Union's assent to a provision that no grievance may be processed by the Union unless the individual employee or employees involved signify their consent to the Union's doing so by signing a statement of the grievance.

2. Whether Petitioner violated Section 8(a)(5) of said Act by unilaterally withdrawing top seniority from Union stewards and other representatives, and by abolishing the contractual grievance and arbitration procedure, prior to an impasse in then pending collective bargaining negotiations, and without giving the Union adequate notice of, and opportunity to negotiate about, such changes in conditions of employment.

Whether Petitioner violated Section 8(a)(5) of said Act by unilaterally imposing upon all of its employees the proposed terms and conditions of employment demanded by it during collective bargaining negotiations, where the Board found that during such negotiations the Petitioner had violated Section 8(a)(5) and had persisted in such violation until the date of such unilateral action.

COUNTER-STATEMENT OF THE CASE.

A petition for certiorari in this case, directed to the United States Court of Appeals for the Third Circuit, was filed on October 31, 1963, by Bethlehem Steel Company (Shipbuilding Division), hereinafter referred to as "Bethlehem". Despite the fact that this petition raises relatively narrow questions of law concerning the statutory duty to bargain—questions to which, as we shall see, both this Court and the courts of the various circuits have repeatedly given the same answers—Bethlehem, obviously seeking to posit a factual context in which these judicial determinations can be overruled, has presented a Statement of the Case which so distorts the instant record as to impel us to submit this counter-statement.[1]

In the summer of 1959, the Industrial Union of Marine and Shipbuilding Workers of America, AFL-CIO (hereinafter referred to as "Union") entered into negotiations with Bethlehem for a new collective bargaining agreement to succeed its then effective collective bargaining agreement with Bethlehem, which, by its terms, was to expire on July 31, 1959. (Since this agreement was executed in 1956, we shall hereafter sometimes use the phrase "the 1956 contract" in referring to it.)

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[1] Bethlenem's methodology in effecting this distortion is the familiar one of stating, as if they were findings of facts, matters which are either not part of the record or which are conclusions reached by Bethlehem, but by no one else. Some examples are: (1) Bethlehem's statement that three of its East Coast shipyards have closed (Petition, p. 4); (2) that foreign and domestic competition had—impliedly, since Bethlehem's last preceding negotiations with the Union, in 1956—reduced Bethlehem's volume of business and that Bethlehem was at a competitive disadvantage in relation to other American shipyards (what were the facts in these regards were sharply disputed issues in this case, which were not determined by findings of fact) (Petition, pp. 5 and 7); (3) that the negotiations came to a halt by August 6, 1959 (Petition, p. 7); (4) that the Union's contract proposals would have interfered with "operational efficiency" (Petition, p. 7); etc., etc.

These negotiations began on July 7, 1959, on which date the Union orally outlined the changes which it desired to be incorporated into the agreement (24a; 541a, par. 14).[2]

On the next day, July 8, 1959, following an oral presentation by Bethlehem's chief negotiator of a printed statement reciting Bethlehem's view of the shipbuilding industry's allegedly bleak economic outlook (24a-26a; 293a; 541a, par. 13), Bethlehem delivered to the Union negotiators a written, detailed description of Bethlehem's proposed changes in the 1956 contract (686a-743a). This statement concluded with the announcement that Bethlehem was willing to negotiate *language* acceptable to the Union but that no compromise was possible as to the *substance* of Bethlehem's proposals (742a-743a; see also third par. on p. 6 of Bethlehem's Petition for Certiorari). Later in the negotiations, on August 3, 1959, Bethlehem presented to the Union and mailed to each of its hourly-paid employees a booklet containing a copy of the collective bargaining agreement as it would read with the incorporation therein of Bethlehem's proposals for changes (762a-841a). This booklet and Bethlehem's proposals incorporated therein came to be called by the parties the "White Book" and we shall hereinafter sometimes use that name in referring to Bethlehem's proposals.

It is not disputed that Bethlehem undeviatingly insisted, throughout all of the negotiations, on obtaining the Union's agreement to each and every provision of this White Book,[3] *some* of the effects of which would have been the following:

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[2] In this brief, references to the pages of the Joint Appendix filed with the lower court are indicated by "a". References to the lower court's opinion, which is reproduced in Appendix A to Bethlehem's Petition for Certiorari, will be designated by "App.".

[3] Bethlehem's chief negotiator pungently described Bethlehem's determination to obtain the White Book as the new collective bargaining contract: "We put it on the table and that's it" (173a). Other record references disclosing Bethlehem's "take it or leave it" attitude toward its proposals may be found at 154a-155a; 157a; 159a; 301a; 314a-316a.

(a) Invalidation of all past practices and arbitrators' awards interpreting contract language (14a; 118a; 122a; 225a; 298a; 691a, Section 1).

(b) A freeze on wages for one year, a freeze on the insurance and pension programs for three years, and deletion of the provisions for "Cost of Living Adjustment" (19a; 773a, Article V).

(c) A grant to Bethlehem of such freedom to assign work to employees out of their respective crafts, and of the right to "schedule off" employees, irrespective of seniority, for an unlimited number of ten-day periods as to result, to quote from the Trial Examiner's Intermediate Report, in "a virtual elimination of seniority in the usual sense" (70a; 793a, last par.-794a; 825a, Article XXII; 790a-791a).

(d) Severe limitations on an employee's right to "call-in pay" (20a; 300a; 779a, Section 1(b)).

(e) The imposition of restrictions on the grievance procedure so severe as to formalize that procedure, in violation of past practice between the parties and of universal industrial practice in this nation, into one burdened by legalisms of common law procedure and by rules of common law pleading (16a-17a).[4]

In addition, and significant to the issue of Bethlehem's conduct in the negotiations when judged by the standards

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[4] Even the Trial Examiner in his Intermediate Report, which substantially exculpated Bethlehem from any violations of the Act, felt impelled to make the following comment on the White Book: "What was really shocking—as the Union immediately reacted—about the Company's proposals in 1959, was that it demanded back, in one fell swoop, many of the piecemeal benefits, which over the years, it had yielded pursuant to periodic demands by the Union . . . all of a sudden the Company sought to recapture many of its previous grants" (71a).

of Sections 8(a)(5) and 8(d) of the Act. Bethlehem proposed, and insisted on the proposal, "that before the Union could process a grievance it [the grievance] must be signed by the individual employee or employees involved" (17a). (Bethlehem's Petition for Certiorari refers to this proposal as its "grievance-signing proposal" and we adopt this phrase when referring to it herein.)

After Bethlehem's July 8 presentation of its proposals, the parties adjourned the negotiations until July 15, in order to give the Union an opportunity to study Bethlehem's proposals.

At the negotiation session held on July 15, 1959, the Union advised Bethlehem that study of the White Book had caused the Union negotiators "shock and amazement" (108a). In the afternoon session of July 15, the Union distributed mimeographed copies of its proposals, summarized them and briefly gave its reasons in support of them (541a, par. 14).

At the next negotiation session, Bethlehem's chief spokesman stated that Bethlehem's answer to all of the Union's proposals, outlined but the day before, was a "flat, absolute and uncompromising no" (55a; 116a; 127a).

After this "flat, absolute and uncompromising no", the parties commenced a review, characterized by very little discussion of the issues (164a-167a; 176a; 222a; 324a-325a), of their respective proposals as they affected the successive articles of the 1956 contract (26a). During this review, Bethlehem's negotiators refused to offer any explanation as to the reasons for any one of its proposals but, when questioned by the Union concerning these reasons, took refuge in the rejoinder, stated and restated by Bethlehem's chief negotiator, that "I think we covered that in our opening statement" (131a-132a; 166a-167a).

This review of the parties' proposals continued until July 28, 1959, when Bethlehem, during the afternoon session of

that date, announced to the Union, without any bargaining on the question, that, effective as of August 1, Bethlehem would no longer give effect, inter alia, to the provisions of the 1956 contract respecting (i) the "top seniority" afforded to Union officials and stewards, and (ii) the provisions setting forth the grievance and arbitration procedures. On August 1, 1959, Bethlehem unilaterally effectuated this announcement (34a; 543a, par. 21).

The article by article review then continued through negotiation sessions conducted on August 2, 6 and 7. At the meeting of August 11, 1959, Bethlehem made another announcement to the Union, viz., since the bargaining had, in Bethlehem's opinion, reached an "impasse", Bethlehem had determined to put into effect, on August 13, 1959, despite the Union's lack of agreement thereto, all of the provisions of the White Book (160a; 545a, par. 25; 843a-847a).* On August 13, Bethlehem, true to its word, carried out its threat and unilaterally imposed the terms of its White Book upon the 18,000 employees represented by the Union in the negotiations (36a; 545a, par. 27).

Since the article by article review had not neared completion by August 13, 1959 (despite Bethlehem's allegation of an "impasse"), the parties continued their negotiations in sessions conducted on August 19, September 1, 16, 25, 29, 30 and October 14 (539a-540a, par. 10a).

In addition to the facts set forth in the foregoing chronological outline of the negotiations in issue, other facts are

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* That Bethlehem had, either prior to or at the very outset of the negotiations, devised the legal defense of an alleged impasse for its determination not to budge from its White Book and not to grant any of the Union's proposals, but unilaterally to impose the White Book as quickly as possible, is seen from the fact that one of Bethlehem's negotiators testified in another proceeding that the parties had been at an impasse since July 16, 1959, the date of their fourth negotiation session and only eight days after the beginning of negotiations (321a-322a).

revelatory of the parties' respective conduct *vis-a-vis* the Act's injunction of good faith bargaining. Some of these facts are the following:

(a) The Union offered, on July 28, 1959, to extend the 1956 contract, which was to expire on July 31, 1959, for thirty days, so as to relieve the pressure which the impending expiration imposed on the bargaining (64a; 145a-146a; 542a, par. 16). With no pause for consideration, Bethlehem's negotiators rejected this proposal (145a; 542a, par. 16).

(b) On August 6, the Union offered that the proposals of both parties be submitted to binding arbitration by a qualified third party. It took Bethlehem but a luncheon recess to decide to decline this proposal (64a; 156a; 305a-306a; 545a, par. 24).

(c) The Union repeatedly proposed that outside persons be consulted for the purpose of advising the parties as to the propriety of certain of their respective proposals, or to suggest more fruitful bargaining procedures. Bethlehem's negotiators either failed to respond to these suggestions to facilitate the bargaining or expressly rejected them (64a; 118a; 148a; 156a; 171a-172a; 322a-323a).

(d) The Union continuously indicated its willingness to compromise, if Bethlehem would itself indicate some willingness to recede from its demand that the *whole* of the White Book (including the grievance-signing proposal) be adopted as the parties' new collective bargaining agreement (140a; 175a; 236a-237a; 262a; 289a; 295a). Bethlehem, however, never indicated such willingness, never budged from its demand for the whole of the White Book, and continuously insisted that, "Our solutions [those found in the White Book] are the only solutions" (157a).

Throughout its Petition, Bethlehem places great reliance upon findings of fact made by the Trial Examiner. In this case, as we point out under Point III below, the decision of the lower court did not attempt to alter any of the Board's findings of fact, but accepted those findings; on the basis of the Board's legal conclusions, however, the court below arrived at a different legal conclusion from that reached by the Board respecting Bethlehem's unilateral actions of August 13. We cannot refrain from pointing out, however, that Bethlehem's heavy reliance on the Trial Examiner's findings of fact is misplaced for two reasons: (i) The Board itself, in its original Decision and Order, stated that it was adopting the Trial Examiner's conclusions, "without completely agreeing with all his subsidiary findings" (84a), and did not withdraw this statement in its Supplemental Decision and Order, despite the dissent of Member Rogers (95a). (ii) A vivid example of the unreliability of those of the Trial Examiner's findings of fact which Bethlehem reiterates throughout its Petition is furnished by paragraphs (a) through (d) above, which are utterly inconsistent with a finding that the Union evinced "fixed and stony inflexibility" to all of Bethlehem's proposals; that the Union unequivocally declared that all the Company's demands are absolutely unacceptable; that the Union had refused to make any concessions; and the like (Petition, pp. 24, 14, 18, 20, 25). The Board's acceptance of the lower court's remand of this case clearly indicates that the Board desires an opportunity to review, among other things, those "subsidiary findings" of the Trial Examiner, which it has thus far not approved.

Finally, the truth of our foregoing description of Bethlehem's conduct in the negotiations—as opposed to the "facts" set forth in Bethlehem's Petition—and Bethlehem's misplaced reliance on the Trial Examiner's findings of fact are established by judicial descriptions of Bethlehem's conduct

enunciated in cases ancillary to the instant litigation. In *Bethlehem Steel Co. v. Kehoe, et al.*, In Equity, No. 76496, 43 Labor Cases, ¶50,373 (1960), the Superior Court of Massachusetts declined Bethlehem's prayer for an injunction against alleged mass picketing at its Quincy, Massachusetts, shipyard and, in the course of its opinion, said the following:

> ". . . The Company's proposals took out of most of the somewhat similar contracts of shipbuilding corporations on the East Coast matters favorable to management and omitted conditions favorable to labor. No shipbuilder on the East Coast has a contract containing provisions similar to those in the Company's proposals. The acceptance of the Company's proposals would place the Company in a substantially better competitive position than any other shipbuilder on the East Coast. We find that this indicates that the Company, in this respect, has failed to make every reasonable effort in good faith to settle the dispute by negotiations."

And in *Bernard L. Alpert, etc. v. Bethlehem Steel Co., etc., et als.* (Civil No. 60-217-S, 1960), Judge Sweeney of the United States District Court of Massachusetts thus described Bethlehem's "bargaining" with this Union in 1959:

> ". . . I find that there is reasonable cause to believe that from the outset the Company had no intention of bargaining with these Unions [sic] in the commonly accepted meaning of the word. It had closed its mind to anything other than a contract based on the terms of the 'White Book' which it had on July 8th outlined to Labor. In all of the meetings thereafter the Company refused in effect to discuss any retreat from the position that it took in the 'White Book' on the many clauses of the contract. The Company had a 'take it or

leave it' attitude, and in spite of all its protestations of good faith, that attitude persists to this moment and precludes bargaining within the meaning of the Act and within its normal connotation. . . ."

ARGUMENT.

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT BETHLEHEM'S INSISTENCE ON ITS GRIEVANCE-SIGNING PROPOSAL THROUGHOUT THE ENTIRE NEGOTIATIONS WAS A VIOLATION OF THE ACT.

At the outset, in light of the statements in Bethlehem's Petition, it should be made clear what the holding of the Trial Examiner, the Board and the Court of Appeals was concerning Bethlehem's grievance-signing proposal. This holding was not, as stated by Bethlehem (Petition, p. 11), that "the Company committed an unfair labor practice by its grievance-signing proposal". As even a cursory examination of all of the decisions in this case makes clear, the Trial Examiner, the Board and the Court of Appeals each held that Bethlehem violated Section 8(a)(5) by *undeviatingly insisting, during the entire course of the negotiations*, on obtaining the Union's assent to its grievance-signing proposal—a proposal which constituted a non-mandatory subject of bargaining—as a precondition to entering into a new collective bargaining contract. The Trial Examiner

(51a-52a), the Board (83a-84a; 88a) and the Court of Appeals (App., p. 6) each relied upon this Court's decision in *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U. S. 342 (1958), as authority for this holding. Accordingly, we shall now discuss that case.

The *Borg-Warner* case, we submit, is correct authority for the proposition that Bethlehem's grievance-signing proposal constituted a non-mandatory subject of bargaining, i.e., a subject not embraced by the list of bargaining subjects set forth in Section 8(d) of the Act, and that, accordingly, Bethlehem's tenacious insistence upon obtaining this proposal violated Section 8(a)(5).

The portion of the *Borg-Warner* opinion relevant here is the consideration given by the Court in that case to the employer's insistence upon obtaining a "ballot clause" in its collective bargaining contract with the union. The ballot clause proposed by the employer provided that the union would not be free to call a strike without first affording to the members of the bargaining unit it represented "an opportunity . . . to vote, by secret . . written ballot on whether to accept or reject the Company's last offer . . ." (*Borg-Warner*, p. 345).

This Court held that such a proposal, while lawful and enforceable if agreed upon by the parties, constituted a non-mandatory subject of bargaining and, hence, a proposal upon which the employer could not lawfully condition its willingness to execute a collective bargaining agreement.

In the course of its opinion, this Court succinctly set forth, at page 350, those characteristics of the ballot clause which distinguished it from a typical no-strike provision, so as to take the clause out of the list of mandatory bargaining subjects enunciated in Section 8(d):

> "The 'ballot clause' . . . deals only with relations between the employees and their unions. It substantially

> modifies the collective-bargaining system provided for in the statute by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative."

The court below correctly apprehended, as did the Trial Examiner and the Board, that the failings in the *Borg-Warner* ballot clause proposal and in Bethlehem's grievance-signing proposal, which prevent those proposals from being mandatory subjects of bargaining, are identical. Thus, Bethlehem's grievance-signing proposal "substantially modifies the collective bargaining system" provided for in the Act, since it prevents the Union from processing grievances that may affect all of the employees in the bargaining unit, unless the Union can prevail upon an individual employee to sign a written statement of the grievance. It is obvious that a contract provision having this effect deprives a certified union of its rights under Section 9(a) of the Act as the exclusive bargaining representative for the whole of the bargaining unit it represents.[6]

Another inherent effect of the grievance-signing proposal makes it clear that that proposal is even more offensive to the policies of the Act than is the "ballot clause" which

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[6] This may be exemplified by one hypothetical case, setting forth an everyday occurrence in industrial relations, viz., an employer, knowing a given employee desires promotion to supervisory status, requests that he work a few hours overtime at straight-time rates. The individual employee, desiring to court favor with the employer, willingly accedes to the request. Under a grievance-signing provision, the union, in these circumstances, could not protest this basic violation of a collective bargaining agreement calling for "time-and-a-half" for overtime, unless the employee signed the grievance. The union's impotence in this situation would, of course, severely undermine its status as bargaining representative, duty bound to enforce, for the benefit of all employees in the bargaining unit it represents, the wage provisions of the agreement.

was in issue in *Borg-Warner*. That effect is that, under a contract containing such a provision, individual employees would be subjected to a vivid sense of fear that by making it possible, by means of their signature, for the union to prosecute a grievance, they would incur the displeasure and reprisals of their supervisors. Moreover, this effect is obviously the precise one intended by Bethlehem. This is seen from Bethlehem's principal rationale for its proposal, namely, the need "to identify claimants and to prevent the grievance procedure from being misused as an instrument to harass the management" (Petition, p. 9). Of course, no signature on a grievance form is necessary "to identify claimants". The practice of the parties under the 1956 contract identified the grievants as well as the grievance-signing proposal ever could do. That practice was for each grievance to bear the name, though not the signature, of the aggrieved employee; only the Union's steward signed the grievance form (312a). Accordingly, the grievance-signing proposal was not needed to identify grievants, but was needed to prevent "harassment" by use of the grievance procedure and would have fulfilled this purpose by intimidating employees to the extent that few, if any, grievances could be filed by the Union even in the most meritorious cases. Thus, the proposal would destroy the Union's rights and its effectiveness as the employees' certified bargaining representative.

Accordingly, the strictures of this Court in the *Borg-Warner* case concerning the ballot clause are perfectly applicable to Bethlehem's grievance-signing proposal.

At page 14 of its Petition, Bethlehem attempts to avoid the foregoing conclusion on the ground that its "insistence" upon this proposal was a "minor matter in the bargaining". There are two answers to this contention.

First, this Court, in the *Borg-Warner* case, held that, as a matter of law, such a violation of the Act—insistence by a party upon a non-mandatory subject of bargaining—is such a "serious matter" as to constitute, in and of itself, a violation of Section 8(a)(5). This Court's description of the evil inherent in a party's insistence upon a non-mandatory subject of bargaining suffices as answer to Bethlehem's contention that its grievance-signing proposal was a "minor matter". At p. 349 of the *Borg-Warner* decision this Court said the following:

> "We agree with the Board that such conduct [insistence upon a non-mandatory subject of bargaining] is, in substance, *a refusal to bargain* about the subjects that are within the scope of mandatory bargaining." (Emphasis supplied.)

Second, the uncontradicted record in this case establishes that the grievance-signing proposal was one of the major issues in the negotiations. The Union repeatedly expressed its unwillingness to agree to this proposal. Bethlehem adamantly insisted upon obtaining it in the new contract. Indeed, the negotiations floundered on Article XIX of the White Book—the Article containing the grievance-signing proposal—for day after day during the negotiations (169a-170a; 312a-314a). In addition, Bethlehem's prior experiences with this Union were enough to put Bethlehem on notice that the Union would never agree to such a proposal. A proposal of similar import had been made by Bethlehem in the 1947 negotiations with this Union. The result of Bethlehem's insistence upon this proposal in 1947 was the filing by the Union of an unfair labor practice charge, which, in turn, resulted in the Board's decision finding Bethlehem guilty of a violation of Section 8(a)(5), in *Bethlehem Steel Company*, 89 NLRB 341. Accordingly, Bethlehem obviously

knew that its grievance-signing proposal was bound to meet with the Union's strenuous opposition—as, indeed, it did (169a-170a; 264a-265a; 312a-314a)—and the record establishes that this opposition, in large measure, prevented agreement between the parties.

Bethlehem's final contention concerning the violation of Section 8(a)(5) committed by it in insisting upon the grievance-signing proposal, amounts to no more than a plea that this Court now undertake to overrule its *Borg-Warner* decision. At page 15 of its Petition, Bethlehem opines that *Borg-Warner*, and, hence, the opinion of the Court below in this case, contravene the philosophy expressed in *NLRB v. American National Insurance Co.*, 343 U. S. 395 (1952), by requiring that parties exclude certain subjects from discussion in the course of collective bargaining negotiations. This, of course, is not the case.

As seen from the explicit language of Justice Burton in *Borg-Warner*, nothing in that case implies "that bargaining is to be confined to the statutory subjects" (*Borg-Warner*, p. 349). Parties are, accordingly, free to enter into discussion, and even agreement, concerning non-mandatory subjects of bargaining, if they so desire. Indeed, discussion of such subjects, short of unyielding insistence, can serve as valuable aid in reaching agreement, since non-mandatory subjects of bargaining can often be agreed upon in the "trading-off" process which normally accompanies good faith bargaining.

Moreover, Bethlehem's alleged fears concerning the deleterious effect of *Borg-Warner* and of the instant case upon our system of collective bargaining are laid to rest by the history of collective bargaining since the *Borg-Warner* decision. Countless collective bargaining agreements executed subsequent to *Borg-Warner* contain provisions respecting performance bonds, industry advancement programs, ballot

clauses, grievance-signing requirements and other non-mandatory subjects of bargaining.[7]

It is thus seen that Bethlehem's purported fears are groundless. The grievance-signing proposal is a non-mandatory subject of bargaining. The Trial Examiner, the Board and the Court of Appeals each correctly applied *Borg-Warner* to the facts of this case and Bethlehem has presented no compelling reasons why, in this case or in any other case, *Borg-Warner* should be overruled. Accordingly, this phase of our case clearly does not justify grant of certiorari.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT BETHLEHEM VIOLATED THE ACT ON AUGUST 1, 1959, BY UNILATERALLY ABOLISHING THE GRIEVANCE PROCEDURE AND THE "TOP SENIORITY" PROVISIONS OF THE 1956 CONTRACT.

As we have seen, on July 28, 1959, Bethlehem announced to the Union negotiators that on August 1 it would discontinue giving effect to the entire grievance procedure—including the provisions for arbitration—of the 1956 contract; and to the provisions therein affording top seniority to Union officers and stewards. On August 1, Bethlehem did so. That this unilateral alteration by Bethlehem of its

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[7] **Painters, Local 164 v. NLRB**, 293 F. 2d 133 (CA. DC, 1961); cert. den., 368 U. S. 824 (1961) (performance bonds); **Detroit Resilient Floor Decorators v. NLRB**, 317 F. 2d 269 (6th Cir., 1963) and **Metropolitan District Council of Carpenters**, 137 NLRB 1583 (1962) (industry advancement program).

Indeed, at page 13 of its Petition, Bethlehem itself states that provisions similar to its grievance-signing proposal are common to many collective bargaining contracts.

employees' terms and conditions of employment constituted an unfair labor practice is so well established under the decisions of this Court, of the Courts of Appeals of the various Circuits and of the Board itself, that only Bethlehem's rather unique contentions as to non-violation require us to comment on this holding of the Board and of the court below. First, however, let us briefly establish what the law in this connection is.

Provisions respecting "top seniority", viz., preferential seniority status, constitute "terms and conditions of employment" within the meaning of Section 8(d) of the Act. *NLRB v. Proof Co.*, 242 F. 2d 560 (4th Cir., 1957); see also *Aeronautical Lodge v. Campbell*, 337 U. S. 521 (1949). Provisions respecting grievance procedures constitute "terms and conditions of employment" within the meaning of Section 8(d) of the Act. *NLRB v. Ross Gear & Tool Co.*, 158 F. 2d 607 (7th Cir., 1947).[*] Accordingly, an employer's unilateral alteration or abolition of these terms and conditions of employment, prior to impasse, necessarily means that the employer refuses to bargain further concerning these subjects. This Court's cases unanimously so hold. *May Department Stores v. NLRB*, 326 U. S. 376 (1945); *NLRB v. Crompton-Highland Mills*, 337 U. S. 217 (1949); *NLRB v. Katz*, 369 U. S. 736 (1962). The decisions on this head of the Courts of the various Circuits are also unanimous. *NLRB v. Proof Co.*, supra; *NLRB v. Valley City Furniture Co.*, 230 F. 2d 947 (6th Cir., 1956); *NLRB v. Century Cement Mfg. Co.*, 208 F. 2d 84 (2nd Cir., 1953); *NLRB v. George P. Pilling & Son Co.*, 119 F. 2d 32 (3rd Cir., 1941). Accordingly, Bethlehem's unilateral abolition, on August 1,

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[*] The holdings in these cases, which designate as "terms and conditions of employment" contract provisions respecting grievance procedures and preferential seniority status, completely demolish Bethlehem's description of its August 1 unilateral action as action concerning mere "Union privileges" (Petition, pp. 8; 17-18; 21; 24).

1959, of the grievance procedure and of the top seniority enjoyed by Union officials and stewards constitutes a violation of Section 8(a)(5) of the Act—a refusal to bargain.

Bethlehem seemingly concedes that the usual rule, as enunciated by this Court, condemns as an unfair labor practice its unilateral action of August 1, 1959. However, Bethlehem reads a defense to this item of its conduct in this Court's opinion in *NLRB v. Insurance Agents' International Union*, 361 U. S. 477 (1960). That defense is this: Bethlehem's unilateral action on August 1, 1959, was not "unilateral action" at all, but was actually a type of "economic pressure" which this Court, in *Insurance Agents'*, held to be consonant with good faith bargaining. The obvious answer to this contention is given by this Court in *NLRB v. Katz*, supra, in which the employer charged with violating Section 8(a)(5) by reason of his unilateral action during negotiations, defended that this unilateral action was protected as "economic pressure" under the *Insurance Agents'* case. In rejecting this contention, this Court stated, at page 747 of *Katz*, that *Insurance Agents'* does not legalize "behavior [unilateral action] which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion . . ." (Thus, for example, if, in *Insurance Agents'*, the respondent union had engaged in mass picketing, secondary boycotts, or other conduct prohibited by Section 8(b) of the Act, the fact that such conduct might have constituted "economic pressure" would not have made that unlawful conduct lawful.)

If further authority is needed for this obvious proposition, we cite *NLRB v. Erie Resistor Corp.*, 373 U. S. 221 (1963), where this Court, at p. 224 of its opinion, designated the employer's grant of super-seniority to employees hired in replacement of strikers as an act which put the union under "great pressure" but nonetheless held that this conduct violated Sections 8(a)(3) and 8(a)(5) of the Act. So,

here, if the form of Bethlehem's "economic pressure" violates the law, there is nothing in *Insurance Agents'* that immunizes Bethlehem from the effect of this violation.

Bethlehem's further defense of its unilateral action of August 1, 1959, is allegedly based on this Court's opinions in *Katz* and *Crompton-Highland*, supra, cases cited by the court below. Bethlehem finds in these cases a broad rule to the effect that unilateral action, otherwise unlawful, is excused upon an employer's affording to the bargaining agent notice of, and an opportunity to bargain with respect to the action. At page 19 of its Petition, Bethlehem goes so far as to say that this Court's condemnation of employer unilateral action in *Katz* and *Crompton-Highland* "*hinged* on lack of notice to, or consultation" with, the bargaining representative prior to the institution of the changes." We find no support in these cases for the broad exception to the usual rule urged by Bethlehem.

However, assuming Bethlehem's construction of *Katz* and *Crompton-Highland* to be sound, this construction can avail Bethlehem nothing. The Court of Appeals in its opinion considered this contention and gave an irrefutable answer to it:

> "But the employer concedes that it was not until July 28, that the Union was notified that these changes were to be effected only three days later. Until this time the Company's [Bethlehem's] own proposed contract included provisions for preferential seniority and a formal grievance procedure. In this setting, it can hardly be said that the Union was given the bargaining

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" Bethlehem fails to point out that in this context, "consultation" means to "bargain . . . concerning changes in the terms and conditions of employment . . ." **NLRB v. Proof Co.**, 242 F. 2d 560, at p. 560 (4th Cir., 1957), cert. denied, 355 U. S. 831. We also desire to make it clear that Bethlehem's use of the disjunctive in the foregoing quotation from its Petition is not accurate; the cases require both notice **and** consultation.

opportunity to which it is entitled under *NLRB v. Katz* . . . and *NLRB v. Crompton-Highland Mills, Inc.*" (App., p. 10).[10]

Moreover, it should be noted that the Union was afforded *no* opportunity to bargain about Bethlehem's intention to take the unilateral action of August 1, 1959. The notification on July 28, of what the Union could expect on August 1, did not take the form (to understate) of an invitation to bargain concerning the subject. As the Trial Examiner noted, Bethlehem simply advised the Union that the changes would be made (34a). This was presented as a *fait accompli;* bargaining on the subject was futile, particularly in light of the fact that Bethlehem had habitually violated the Act by the same type of conduct in its prior negotiations with this Union, despite the Union's protests (536a-537a).

From the foregoing, we see that under the unanimous case authorities, Bethlehem's unilateral action of August 1, 1959, constituted a violation of Section 8(a)(5) of the Act and the Board and the Court of Appeals correctly so held.

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[10] Nothing in the opinion of the court below precludes the Board from considering, in the proceedings to be conducted by the Board pursuant to that court's order remanding the case, the **question of fact** raised by Bethlehem's contention that, under the circumstances, the July 28 announcement of the August 1 unilateral action afforded to the Union "ample opportunity . . . to bargain" (Petition, p. 19) concerning that action. Since the Board has accepted remand of this case, it is submitted that Bethlehem's contention in this regard does not afford a basis on which certiorari should be granted.

III.

THE COURT OF APPEALS CORRECTLY HELD THAT, BY REASON OF BETHLEHEM'S IMMEDIATELY PRECEDING UNFAIR LABOR PRACTICES, THERE WAS, ON AUGUST 11, 1959, NO BONA FIDE IMPASSE IN THE BARGAINING AND THAT, ACCORDINGLY, BETHLEHEM'S UNILATERAL IMPOSITION OF THE WHITE BOOK ON AUGUST 13 CONSTITUTED AN UNFAIR LABOR PRACTICE AS A MATTER OF LAW.

In both of its opinions, the Board held that, since the bargaining, by August 11, 1959, had reached a state of "impasse", Bethlehem was legally justified in unilaterally imposing upon its employees, on August 13, the changes in wages and working conditions set forth in the White Book. The court below held, contra to the Board, that, by reason of Bethlehem's unfair labor practices immediately preceding August 11 the bargaining may not be said to have resulted in a bona fide impasse and that, accordingly, Bethlehem's unilateral imposition of the White Book constituted, as a matter of law, a violation of Section 8(a)(5).

In Point III of its Petition, Bethlehem criticizes on five grounds this holding of the court below. As we shall now see, none of these criticisms of the lower court's holding has any merit or can survive analysis.

1. The court below did not invade the Board's province of fact finding.

Bethlehem argues (Petition, pp. 21 and 22) that, since the Board did not find Bethlehem guilty of "subjective bad

faith", the lower court's conclusion that Bethlehem's unilateral imposition of the White Book violated Section 8(a)(5) constituted a reversal of the Board's finding concerning Bethlehem's state of mind in the negotiations and was, hence, a holding contra to the rule of *Universal Camera Corp. v. NLRB*, 340 U. S. 474.

The fatal fault in Bethlehem's logic in this regard is that it proceeds on the unfounded premise that only where an employer is guilty of "subjective bad faith" in bargaining may his unilateral alteration, during the bargaining, of his employees' working conditions constitute a violation of Section 8(a)(5). Whatever doubt there may have been on this head was laid to rest by this Court's opinion in *NLRB v. Katz*, supra, where the precise issue on which certiorari was granted and to which this Court gave its answer was the issue now raised by Bethlehem.

This Court held in *Katz* that an employer's unilateral alteration of his employees' terms and conditions of employment during contract negotiations, and prior to an impasse, is tantamount to a flat refusal to bargain in fact, and that where such conduct is present, "there is no occasion to consider the issue of good faith", since such conduct "violates Section 8(a)(5) though the employer has every desire to reach agreement and earnestly and in all good faith bargains to that end." Thus, under *Katz*,[11] the court below had no need to—and, as we shall now show, did not—reach or pass upon or modify the Board's holding that it could not ascribe subjective bad faith to Bethlehem.

The court below held that *Katz* was applicable to this

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[11] **Borg-Warner**, as Bethlehem concedes in the first full paragraph of page 21 of its Petition, holds identically with **Katz**, in that, to quote Bethlehem, "this Court held **that** an employer could be found guilty of refusing to bargain **regardless of his good faith**, where he, in effect, refused to bargain over the mandatory subjects". (Bethlehem's emphasis)

case, because here, as in *Katz*, there was no impasse in the sense of a deadlock that would excuse Bethlehem's unilateral actions of August 13. The reason for this holding was that under the authorities and under the dictates of common sense (App., p. 12), a deadlock in negotiations during which the employer has violated the rules of good faith bargaining, as laid down in Sections 8(a)(5) and 8(d), cannot afford a justification for the employer's refusal to bargain further by unilaterally changing his employees' working conditions. Since the Board had found that the unilateral changes of August 1 and Bethlehem's insistence on the grievance-signing proposal did, as a matter of law, constitute violations of the duties imposed upon Bethlehem by Sections 8(a)(5) and 8(d), and since Bethlehem "had . . . not purged itself of its earlier violations" (App., p. 13), any deadlock that may have occurred in Bethlehem's negotiations with the Union did not constitute a good faith impasse that would justify or exculpate Bethlehem's imposition of the White Book upon its employees.

Merely to state this holding of the court below is to see that it is not grounded on Bethlehem's subjective bad faith or, indeed, on any other question of fact. Accordingly, the rule of *Universal Camera Corp.* is utterly inapposite to the issues properly presented by Bethlehem's Petition.

2. The court below did not apply a per se rule of law in holding that since the alleged deadlock in negotiations was preceded by conduct violative of Section 8(a)(5), Bethlehem's unilateral actions of August 13 were, therefore, not excused by a bona fide impasse.

Bethlehem argues (Petition, pp. 22-23) that in *Insurance Agents'* this Court enunciated a policy condemning *per se* rules of law and that the court below went counter to this

policy and applied a *per se* rule of law in concluding that Bethlehem, by violating Section 8(a)(5) prior to August 11, as the Board had held, prevented the alleged deadlock from being an impasse that would exculpate Bethlehem's unilateral imposition of the White Book on August 13. This argument suffers from two fatal defects.

In the first place, the court below applied no *per se* rule *of law*. Under the weighty authorities cited by the court below (App., p. 12), a deadlock exculpates unilateral action only if that deadlock is preceded by, and results despite, good faith bargaining, i.e., bargaining conduct which is conformant to the requirements of Sections 8(a)(5) and 8(d). With ample support in the record, the Board held that Bethlehem's unilateral changes in working conditions on August 1, and its insistence on the grievance-signing provision, constituted violations of Section 8(a)(5). It is obviously a *per se* rule of logic and common sense—rather than of law—that it is impossible to say that a party, while committing a violation of Section 8(a)(5), simultaneously conformed to the mandates of Section 8(a)(5). Thus, the court below was merely applying the inescapable dictate of common sense and logic expressed in the unanimous cases and authorities relied upon by it and which do no more than apply the time-honored equitable rule that a party may not profit or gain advantage—here, impunity for unilateral action—from his own unlawful acts.

In the second place, this Court's opinions not only fail to disclose a policy condemning what Bethlehem deems to be "per se rules" in judging whether conduct conforms to the standards of Sections 8(a)(5) and 8(d), but, indeed, enunciate a contrary policy. Without using the phrase "per se", this Court has consistently announced and abided by the view that certain conduct, in and of itself, is so inconsistent with the statutory duty to bargain as conclusively to constitute a violation of that duty. We need go

no further than the *Katz* case, where this Court held that irrespective of the employer's "good faith", his unilateral action constituted conduct so "contrary to the Congressional policy" as to "amount to a refusal to negotiate"—a violation of Section 8(a)(5) (*Katz*, p. 747).

And in *NLRB v. Erie Resistor Corp.*, 373 U. S. 221 (1963), a case decided late last term, this Court held that notwithstanding the employer's innocent, economic motivation, the unfair labor practice defined in Section 8(a)(3) of the Act had been committed when the employer, pursuant to that innocent motivation, granted super-seniority to employees hired in replacement of strikers and to employees who refrained from striking.[12]

3. The court below did not condition the privilege of unilateral action upon lack of prior violations of Section 8(a)(5).

Bethlehem contends, in effect (Petition, p. 24), that the court below has enunciated a *per se* rule that, in every case, an employer is prohibited from taking unilateral action where, prior to that action, he has violated Section 8(a)(5).

Nothing in the opinion of the court below can properly be so construed. What the court plainly held is this: the violations of Section 8(a)(5) persisted in by Bethlehem, as the Board found, up to and including August 13, 1959, precluded a holding that Bethlehem's conduct of the bargaining had conformed to the requirements of Section 8(a)(5), with the consequence that any deadlock allegedly

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[12] **Borg-Warner, Crompton-Highland Mills** and **May Department Stores** are other cases in which this Court sustained findings that Section 8(a)(5) had been violated irrespective of the employer's "bad" or "good faith".

reached could not constitute an impasse of such nature as normally excuses unilateral action.[13]

In this connection, it is to be noted that contra to the impression which may be gleaned from Bethlehem's statement of its contention, this is not a case in which an employer has committed an unfair labor practice; has thereafter rescinded or neutralized the acts constituting the unfair labor practice; and then, later, asserts a bona fide impasse as a defense to his unilateral action. In this case, Bethlehem never withdrew its grievance-signing proposal but, as its Petition concedes at page 14, tenaciously insisted upon obtaining it in the bargaining sessions both before and after August 11, 1959, the date of the alleged impasse. The same is true of Bethlehem's unilateral actions of August 1: Bethlehem never rescinded or eradicated the effects of its abolition of super-seniority and of the grievance procedure, including arbitration, set forth in the 1956 contract.

Under these circumstances—where an employer persists in violations of Section 8(a)(5) right up to the date of the alleged impasse, i.e., where the violations are simultaneous with the unilateral action—settled doctrine compelled the lower court to hold that there was no bona fide impasse in the sense in which the authorities use that term, and that, accordingly, Bethlehem's unilateral imposition of the White Book constituted a violation of Section 8(a)(5) as a matter of law. This is a far cry from a holding that, under all circumstances, an employer's privilege of unilateral action

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[13] The cases cited by Bethlehem at page 24 of its Petition do not propound a contra rule and do not say that an employer may always take unilateral action after "the Union has been given notice and opportunity for bargaining" (Petition, p. 23). In **NLRB v. Bradley Washfountain Co.**, the Court of Appeals for the Seventh Circuit concluded that the employer's grant of a wage increase was not "unilateral". In the other four cases, the Board reiterated the firmly entrenched rule that the existence of a bona fide impasse is the legal precondition to employer unilateral action.

is conditioned "upon lack of *prior* violations" of Section 8(a)(5) (Petition, page 23).

4. Bethlehem did not give the Union adequate notice of, or opportunity to bargain about the unilateral imposition of the White Book.

At pages 23-24 of its Petition, Bethlehem defends its imposition of the White Book on the ground that the Union was given notice of and an opportunity to bargain concerning Bethlehem's unilateral actions of August 13. Assuming, *arguendo*, that such notice and opportunity to bargain would excuse an employer's unilateral action which has effects as all-pervasive as those flowing from the imposition of the White Book, such a rule of law cannot aid Bethlehem here.

On August 11, 1959, Bethlehem announced to the Union negotiators its intention to impose the White Book a mere two days thereafter (545a, par. 25; 843a-847a). This notice was given and the White Book was put into effect despite the fact that the parties' preliminary review of their respective proposals had not yet, by August 11, touched upon a substantial number of very important proposals (161a-165a; 168a; 749a-758a; 823a-841a).[14] Accordingly, Bethlehem afforded to the Union absolutely no opportunity to bargain concerning a substantial number of substantive provisions in the White Book, let alone a reasonable opportunity to bargain concerning Bethlehem's intention to impose upon the employees on August 13 *all* of the provisions set forth in the White Book.

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[14] Among these were the Union's proposals for additional paid holidays, an improved insurance program, a liberalized pension program, increases in wages, and the addition of new so-called "premium rates"; and Bethlehem's proposals respecting division of work, assignment of work, a new method of computing holiday pay, and the rescheduling of shifts.

Moreover, no negotiation session was scheduled or held on August 12. On August 13, the White Book was imposed. Accordingly, Bethlehem gave the Union but one full day's notice of its intention to take the drastic unilateral action it effectuated on August 13. As the court below concluded concerning Bethlehem's contention that it had given the Union "notice and opportunity to bargain" preceding the more limited unilateral action of August 1, ". . . it can hardly be said that the Union was given the bargaining opportunity to which it is entitled under *NLRB v. Katz* . . . and *NLRB v. Crompton-Highland Mills, Inc.*" (App., p. 10). The irrevocability of Bethlehem's intention to impose the White Book on August 13, and the denial to the Union of any opportunity to bargain about the matter, are made further manifest by the fact that Bethlehem on August 11 posted notices in all of its shipyards "to all hourly-paid employees represented by the [Union]" advising the employees that on August 13 they would start working under the worsened terms and conditions set forth in the White Book (545a, par. 26-547a).

5. Bethlehem's violations of Section 8(a)(5) preceding August 13 were so serious in nature as to make it inconsistent with Section 8(a)(5) to hold that the imposition of the White Book was excusable.

At page 25 of its Petition Bethlehem argues that because the violations of Section 8(a)(5) of which the Board had found it guilty were "not serious", the lower court erred in holding that the commission of, and persistence in these violations negated an impasse that would exculpate Bethlehem's unilateral action of August 13. The footnote on that page of the Petition would indicate that Bethlehem is here restating an argument made by it at page 14 of the Petition.

namely, that the lower court's holding was in error because Bethlehem's insistence on the grievance-signing proposal—as well, we suppose, as its commission of, and persistence in, its unilateral actions of August 1—were not the cause of the deadlock upon the mandatory subjects of bargaining which were in issue in the negotiations.

For a number of reasons, this contention presents no reason supporting the grant of certiorari.

(a) None of the case authorities holds that violations of Section 8(a)(5) during negotiations must be the cause—or even a cause—of a deadlock, in order to prevent such deadlock from being deemed an impasse which excuses unilateral action. The settled rule appears to be that where uncured violations of Section 8(a)(5) occur during bargaining, a deadlock in the bargaining cannot excuse unilateral action. This rule derives from another rule, namely, that only an impasse arising during bargaining which conforms to the mandates of Section 8(a)(5) may be deemed to make further bargaining useless and, hence, to justify unilateral action.[15] The rule thus laid down by the cases is supported by reason and the realities of collective bargaining as well as by legal logic.

To hold that violations of Section 8(a)(5) committed during bargaining must have been the cause of a deadlock in order to prevent the deadlock from being deemed an im-

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[15] **NLRB v. Yutana Barge Lines, Inc.**, 315 F. 2d 524, 529-530 (9 Cir., 1963); **Carpinteria Lemon Assn. v. NLRB**, 240 F. 2d 554 (9 Cir., 1956); **Reed & Prince Mfg. Co. v. NLRB**, 205 F. 2d 131 (1 Cir., 1953); **City Packing Co.**, 98 NLRB 1261 (1952); **NLRB v. Andrew Jergens Co.**, 175 F. 2d 130 (9 Cir., 1949). In **Vanette Hosiery Mills**, 114 NLRB 1107 (1956) and in **Reed & Prince Mfg. Co.**, 96 NLRB 850 (1951), the Board found that the responsibility for the deadlock was attributable to the employer's lack of good faith; however, the Board did not hold that such finding was necessary in order to deprive the deadlock of the character of an impasse which would exculpate the employer's unilateral action.

passe which excuses unilateral action would introduce guess and conjecture into the determination of whether unilateral action is permissible or not. In so emotion-fraught and potentially explosive a human activity as collective bargaining, what will or will not cause a deadlock, what is or is not an important issue, what effect one party's position or action on an issue will have on the other party—all these are necessarily matters of conjecture, since they cannot be appraised with any degree of certainty. The only way of discouraging the utilization of bargaining strategy or techniques that skirt as closely as possible to violations of Section 8(a)(5), the only way of discouraging the parties from gambling on what the Board and the courts will hold to be important or unimportant issues or violations of Section 8(a)(5), is to adhere to the rule that any unremedied violation of Section 8(a)(5) during bargaining that ends in a deadlock will prevent that deadlock from being a defense to unilateral action.

(b) Assuming, *arguendo*, that the law were to the contrary, the pronouncements of this Court seem to make it quite clear that because of the character of the violations of Section 8(a)(5) which Bethlehem committed and persisted in, those violations were necessarily at least a greatly contributing cause of the alleged deadlock in this case.

The following are this Court's expressions respecting an employer's unilateral action during collective bargaining:

May Department Stores Co. v. NLRB, 326 U. S. 376, 385 (1945):

> "Such unilateral action minimizes the influence of organized bargaining. It interferes with the rights of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."

In *NLRB v. Crompton-Highland Mills, Inc.*, supra, at pages 221-222, where the employer unilaterally granted bet-

ter working conditions, rather than, as in our case, imposing worsened working conditions, this Court approved the following statement by the Board:

> "In our opinion, such action taken so soon after the Union was attempting through the bargaining process to reach an agreement . . . clearly *shows that the Respondent was not acting in good faith during the negotiations, and is manifestly inconsistent with the principle of collective bargaining.*" (Emphasis supplied by Court.)

NLRB v. Insurance Agents' International Union, supra, at page 485:

> "For example, an employer's unilateral wage increase during the bargaining processes tends *to subvert the Union's position as a representative of the employees* in matters of this nature, and hence has been condemned as a practice violative of this statutory provision. See *Labor Board v. Crompton-Highland Mills, Inc.*, 337 U. S. 217." (Emphasis supplied.)

NLRB v. Katz, supra, at page 747:

> "Unilateral action by an Employer without prior discussion with the Union does amount to a *refusal to negotiate* about the affected conditions of employment under negotiation, and must of necessity *obstruct bargaining, contrary to the Congressional policy.* It will often disclose an unwillingness to agree with the Union. It will rarely be justified by any reason of substance. It follows that the Board may hold unilateral action to be an unfair labor practice in violation of Section 8(a)(5), without also finding the employer guilty of overall subjective bad faith." (Emphasis supplied.)

This Court's condemnation of an employer's insistence upon a non-mandatory subject of bargaining has been even more severe. At page 350 of *Borg-Warner*, supra, this Court spoke as follows respecting the "ballot" clause there in issue, a clause which is clearly analogous to Bethlehem's grievance-signing proposal:

> "... the ... clause ... substantially modifies the collective bargaining system provided for in the statute *by weakening the independence of the 'representative' chosen by the employees. It enables the employer, in effect, to deal with its employees rather than with their statutory representative.*" (Emphasis supplied.)

And, at page 349 of the *Borg-Warner* opinion, this Court spoke as follows concerning the effect, generally, of an employer's insistence that a collective bargaining agreement contain a provision respecting a non-mandatory subject of bargaining:

> "We agree with the Board that such conduct is, in substance, *a refusal to bargain about the subjects that are within the scope of mandatory bargaining.*" (Emphasis supplied.)

It would seem obvious that bargaining tainted, as was Bethlehem's, by violations of Section 8(a)(5) of so basic a nature must of necessity have been either the cause, or a significantly contributing cause to any deadlock in the negotiations and, therefore, necessarily prevented such deadlock from being, either in law or in common sense, an impasse following good faith bargaining and excusing Bethlehem's all-pervasive unilateral change of working conditions on August 13.

(c) Still assuming, *arguendo*, that Bethlehem's contention is correct, and that there must be a finding that the

violations of Section 8(a)(5) committed by Bethlehem caused the alleged deadlock, before it may be held that the unilateral imposition of the White Book was also a violation of Section 8(a)(5); and assuming, further, that this Court's condemnation of the kind of violations of Section 8(a)(5) which Bethlehem committed does not warrant the finding of such a causal connection, then Bethlehem's Petition is premature for the following reasons.

Neither the Trial Examiner nor the Board made any finding as to the effect of Bethlehem's unilateral actions of August 1 upon the possibility of the parties reaching agreement. The Trial Examiner did opine, however, that "the impasse was not materially affected by" Bethlehem's insistence upon its grievance-signing proposal (75a). Obviously, this leaves ample room for the conclusion that the impasse was, at least in some degree, caused by this particular violation of Section 8(a)(5). Whether the Board agreed with this recommended finding cannot be ascertained because the Board, both in its original Decision and Order and in its Supplemental Decision and Order, pointedly announced that it was not completely agreeing with all of the Trial Examiner's subsidiary findings (84a, 95a), without, however, specifying these subsidiary findings. Accordingly, the lower court's remand, and the Board's acceptance thereof, should be left undisturbed so as to give the Board an opportunity to make findings on these matters, if such findings are deemed necessary to a determination of whether Bethlehem's imposition of the White Book was a violation of Section 8(a)(5).

CONCLUSION.

For all of the foregoing reasons, the Union respectfully submits that Bethlehem's petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 595

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Petitioner,

against

NATIONAL LABOR RELATIONS BOARD,
Respondent,

INDUSTRIAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA, AFL-CIO,
Respondent,

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Reply to Board's Brief

The petition herein is not premature, as the Solicitor General contends.

1. It is argued that the court below directed remand because the Board, in holding that the Company did not violate the Act by unilaterally putting its contract proposals into effect on August 13, 1959, did not consider whether the impasse was caused by petitioner's prior unfair labor practices (Board Brief, p. 12). This is contrary to the facts.

The factual findings in this case are principally contained in the Trial Examiner's intermediate report (3a-81a). The Board made no independent or contrary

findings of fact (83a-84a; 87a-92a), differing as to the Trial Examiner's legal conclusion in regard to the temporary suspension of Union privileges on August 1, 1959. Those findings, amply supported by the record, make it clear that the impasse which preceded the putting into effect of the Company's proposals on August 13, 1959, was not caused by the two prior alleged unfair labor practices, but by the head-on collision between Company and Union positions as to the economic terms of the new agreement:

"After carefully considering every fact in this long record, including those mentioned here and a multitude of others too minute to warrant repetition in this Report, and all the implications that can reasonably arise from the timing of the events and from seemingly unrelated actions, I can only conclude that this was fundamentally an economic disagreement between the Respondent and the Union...." (74A)

"The question of employee signatures to grievances was a very minor matter in the bargaining; the dispute was far broader, and the impasse was not materially affected by it." (75a)

"A consistent refrain throughout the negotiation was the Union's unequivocal declaration that all the Company demands were absolutely unacceptable." (61a)

In making its initial ruling the Board "considered the Intermediate Report, the exceptions and briefs, and the entire record" and did not make any contrary findings. (84a)

Further, in the Union's Motion for Reconsideration (p. 10), which it filed with the Board on December 5, 1961, it expressly argued that a bona fide impasse could not have arisen on August 11, 1959, because of the prior *per se* violations of Section 8(a)(5) committed by

Bethlehem. The Board, although finding Bethlehem guilty of the prior violations, reaffirmed its conclusion as to Bethlehem's good faith and its ruling that Bethlehem did not violate the Act in connection with the August 13, 1959, changes.

The Board, thus, considered the very question that is now said to be the purpose of the remand, hence remand for that purpose would be a futile act and unjustifiably delay final decision on the important questions presented here.

As stated in the petition, it appears that the only purpose of the remand is to invite, if not direct, the Board to apply a *per se* rule of law to the August 13 changes, based solely on the prior unfair labor practices. This, as set forth in the petition, is contrary to the rule of law established by this court.

2. The remand directed by the lower court could not conceivably alter the questions presented by the rulings of the lower court and of the Board as to the alleged violations by petitioner in connection with the grievance-signing proposal and the cancellation of Union privileges. As is plain from the lower court's opinion, the remand has to do only with the Board ruling in respect of the August 13 changes. The rulings of the Board and the Court as to the two prior violations are, thus, also ripe for decision now.

In this connection, the Court should note that the Solicitor General concedes (Board Brief, p. 16) that "the question is debatable" whether the petitioner's grievance-signing proposal is governed by *Borg-Warner*.

Reply to Union's Brief

The Union's Brief, in large measure, restates the Union's version of the facts and its arguments on the

merits of the issues involved—matters summarily covered in the petition herein.

Aside from noting petitioner's general disagreement with the Union's statements of facts and argument, special exception is taken to the assertion (Union Brief, p. 29; see also Board Brief, p. 12, footnote 10) that "the settled rule appears to be that where uncured violations of Section 8(a)(5) occur during bargaining, a deadlock in the bargaining cannot excuse unilateral action." The cases do not support this assertion, and it is not the settled rule of law. The cases referred to hold that an impasse caused by an employer's subjective bad faith does not authorize unilateral action, for under those circumstances unilateral action is further indicative of bad faith. The rule has never been applied in a case where, as here, there is an affirmative finding that the employer was not bargaining in bad faith.

Respectfully submitted,

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